86-696

No. .....

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM 1986

FIDELITY FINANCIAL CORPORATION,
Petitioner,

VS.

FEDERAL HOME LOAN BANK BOARD
OF SAN FRANCISCO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does a Federal Home Loan Bank have the statutory and constitutional power to exercise plenary discretion — free from due process requirements of notice and hearing and also free from prior or subsequent judicial review — to deny arbitrarily the advances of funds promised under 12 U.S.C. § 1427(j) to a state-chartered voluntary member?

2. Is the benefit of an advance of funds by an FHLB to a member/shareholder/borrower a property interest which is protected by due process of law requirements?

3. Is an FHLB contractually obliged to make advances to a member/shareholder/borrower, under a contract whose terms incorporate applicable statutes and regulations?

4. Conversely, is a member/shareholder/borrower which applies for advances from an FHLB a mere supplicant with neither a property interest nor a contractual right congnizable at law, whose requests can be denied for no reason at all and free of judicial review?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Fidelity Financial Corporation, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit in its case No. 84-2634 entitled "Fidelity Financial Corporation, Plaintiff-Appellant, v. Federal Home Loan Bank of San Francisco, Defendant-Appellee."

OPINIONS BELOW

The opinion of the Court of Appeals on which this petition is based is reported at 792 F.2d 1432 and is Appendix A hereof. A prior opinion of the Court of Appeals in this case is reported at 689 F.2d 803 (certiorari denied, 461 U.S. 914) and is Appendix B. The first two opinions of the District Court in this case are reported at 540 F.Supp. 1374 (Appendix C) and 589 F.Supp. 885 (Appendix D). A third opinion of the District Court, unreported, is Appendix E.

JURISDICTION

The Court of Appeals had jurisdiction under 28 U.S.C. § 1291. Its judgment was entered on June 27, 1986. A timely petition for rehearing was filed on July 10, 1986, and was denied on July 29, 1986, by an order, which is Appendix F.

STATUTES INVOLVED

The Federal Home Loan Bank Act (12 U.S.C. §§ 1421-1449) is an appendix. § 1427(j), generally called Section 7(j), provides:

> "(j) Such board of directors shall administer the affairs of the bank fairly and impartially and without discrimination in favor of or against any member or nonmember borrower, and shall, subject to the provisions hereof, extend to each institution authorized to secure advances such advances as may be made safely and reasonably with due regard for the claims and demands of other institutions, and with due regard to the maintenance of adequate credit standing for the Federal Home Loan Bank and its obligations."

Section 9 (§ 1429) provides:

> "Any member or nonmember borrower of a Federal Home Loan Bank shall be entitled to apply in writing for advances. Such application shall be in such form as shall be required by the Federal Home Loan Bank with the approval of the board. Such Federal Home Loan Bank may at its discretion deny any such application, or, subject to the approval of the board, may grant it on such conditions as the Federal Home Loan Bank may prescribe."

The entire Act is Appendix G. Relevant regulations are Appendix H.

STATEMENT OF THE CASE

The Federal Home Loan Bank of San Francisco (the Bank) refused to make advances (loans) to Fidelity Savings and Loan Association (Fidelity) on a non-discriminatory basis and in accordance with § 7(j). That denial forced Fidelity into a financial condition through which the Bank persuaded the California

Savings and Loan Commissioner to seize Fidelity's assets and to appoint Federal Savings and Loan Insurance Corporation (another federal agency controlled, like the Bank, by the Federal Home Loan Bank Board) as receiver. FSLIC subsequently disposed of Fidelity's assets to Citicorp Savings and Loan, a subsidiary of Citicorp Bank.

Fidelity (and petitioner, its parent corporation) have been denied any review of any of the actions of the Bank. There being no administrative remedy provided in the governing regulations, an action was filed in the District Court.

Both the District Court and the Circuit Court ruled that there is no judicial remedy for a member/shareholder of the Bank who has been denied advances. The District Court held that no cause of action was stated in the complaint and ordered dismissal of three counts and summary judgment on the fourth, because Fidelity produced no evidence of fraud, gross negligence or willful misconduct by officers and/or directors of the Bank, a tort remedy which the District Court conceived as the only possibility.

The Circuit Court affirmed on the ground the Bank's discretion was unconstrained by specific limiting criteria and that Fidelity did not have a property interest in receiving credit or advances. That Court further held that Fidelity had no cause of action for breach of a federal common law fiduciary duty.

The District Court had denied a motion to amend the complaint to set forth explicitly (without any further or different factual allegations) the legal theories of breach of contract and breach of an implied covenant of good faith and fair dealing. The request for the amendment was made in order to bring forcefully to the District Court's attention theories which it ignored. No amendment was necessary under the Federal Rules, because the complaint should not have been dismissed if recovery were possible on any theory, pleaded or not. The Court of Appeals approved the denial of the motion to amend without considering the contract theories at all.

This case has not been tried on the merits. A preliminary injunction, issued after the seizure of assets and exclusion of management of Fidelity, was set aside by the Ninth Circuit Court of Appeal on "teleological" findings. That euphemism permitted the avoidance of saying directly that a certain outcome was

desired and necessary assumptions were made to achieve it. On the subsequent consideration by the District Court, dismissal and summary judgment were granted despite the expectation expressed by the Court of Appeals that a "post-intervention hearing" would occur.

On appeal the Court of Appeals ruled inconsistently with its prior decision in the case. In setting aside the injunction it had stated its understanding that there would be a hearing on the merits, allowing contests on the issues of a right to notice and a hearing and the sufficiency of the basis of the seizure of assets. However, after the District Court held that the issues were not contestable, because of plenary discretion of the Bank, the Court of Appeals affirmed the ruling, thus contradicting itself by approving denial of the very hearing contemplated by its first decision. What had been deemed contestable in the first appellate decision had become incontestable in the second, although there was no change in the law.

The result is that a state-chartered savings and loan corporation, which voluntarily became a member and stockholder of the Bank in reliance on the statutory and contractual promise that, as the principal fruit of membership, advances *shall* be made in accordance with stated standards, can be denied such advances by summary action under unlimited discretion, free from both prior notice and hearing and subsequent review, either administrative or judicial. The regulations governing the Bank promulgated by its creator, the Federal Home Loan Bank Board, provide no administrative remedy. And now the Court of Appeals has ruled there is no judicial remedy.

Fidelity is a California corporation chartered as a savings and loan institution. It voluntarily became a member and stockholder of the Bank, pursuant to 12 U.S.C. § 1424. The Bank is part of the nationwide system which is subject to the Federal Home Loan Bank Board and functions as a credit facility for savings and loan institutions, which in turn loan money to homeowners. The Bank is a membership corporation which exists to serve the needs of member institutions for funds. H.R.Rep.No. 1418, 72nd Cong., 1st Sess. (1932); 12 U.S.C. § 1437; FHLBB 20th Anniversary Bulletin, 1952. To become a member of the Bank Fidelity was required to purchase stock and to maintain stock holdings at a

level determined by its mortgage portfolio and its outstanding advances from the Bank. 12 U.S.C. § 1426(c)(1) and (c)(2).

The Federal Home Loan Bank Board is an independent federal agency charged with administration and supervisory control over regional banks. 12 U.S.C. §§ 1422, 1423 and 1437. The regional bank system was established to provide liquidity to member associations by making advances available to meet withdrawals of depositors and to meet recurring needs for home loan funds not met through savings inflows. H.R.Rep.No. 1418, *supra*.

The granting of advances is governed by Sections 9 and 7(j). In addition a regulation at 12 C.F.R. § 531.1(d) requires that the soundness of the borrowing member be considered in deciding whether to grant an advance.

Since the action was dismissed on the pleadings, the allegations of the complaint must be accepted as true.

The difficulties arose from the discontinuance by the Federal Reserve Board on October 6, 1979, of control of interest rates. Dramatic increases in market rates caused investors to withdraw funds from savings and loan institutions to seek more attractive rates elsewhere. Fidelity applied for advances which it alleges were denied arbitrarily and discriminatorily.

The dependence of a member on the Bank for advances was heightened after October 31, 1979, by a requirement limiting the amount a member could borrow from outside sources to 10% of its total savings deposits. By Bulletin No. 136 issued May 1, 1978, the Bank had stated specific criteria on which short term and long term credit was available to members. Members unable to qualify for regular credit were eligible for short term "Other Special Credit," for which a penalty rate of 2% was charged and which had to be fully repaid before additional regular credit could be granted, subject to exceptions under unusual or extenuating circumstances. The OSC category was created to serve the mild regulatory purpose of discouraging inadequate planning of cash inflow by a temporary sanction of a short term nature and not to inflict financial disability.

Within a month after the discontinuance of interest rate controls, Fidelity experienced a net savings outflow. It applied for short term credit advance of $75 million. Instead of processing

the application, the Bank arbitrarily placed Fidelity in the OSC category, without notice or hearing. That imposed a punitive interest rate, rendered discretionary Bank credit unavailable, and excluded it from the computation of available sources of cash. The result was an automatic increase in projected cash flow deficiency. Simultaneously outside funds were less available in the deregulated marketplace. Fidelity requested reconsideration of the denial of short term credit and its placement in OSC, but the Bank's Credit Exceptions Committee (not the Bank president or the whole Board of Directors) denied the request. No hearing was allowed so that Fidelity could offer proof of unusual or extenuating circumstances.

When Fidelity's cash flow position improved in a few months, the Bank, acting against the recommendation of its own Credit Exceptions Committee, merely waived the 2% penalty interest, keeping Fidelity in the OSC, thus restricting its access to funds on a regular credit basis, from either the Bank or outside lenders. In short, the Bank concluded that Fidelity was ineligible to be removed from the OSC only because the Bank itself would not permit Fidelity to escape it. Fidelity then requested the Bank to refinance the OSC debt with long-term credit, as interest rates had declined and the Bank was encouraging other member associations to refinance high rate Bank advances with low interest, fixed rate, long term advances. The Bank declined to permit Fidelity to do so, without any hearing at which Fidelity could prove its entitlement by qualification for either regular advances or refinancing its debt as long-term debt. On the contrary, the Bank reimposed the 2% interest penalty on the ground that there was a loss of profit to the Bank.

A year later Fidelity again requested the conversion of its OSC borrowings to long-term credit and restoration of regular credit. The request was denied without a hearing. After Fidelity's net loss of $57 million in 1981 was published in April of 1982, substantial depositor withdrawals occurred. The Bank's Executive Committee then concluded it would make no further advances to Fidelity. The Bank prevailed upon the California Savings and Loan Commissioner to take possession of Fidelity's assets on April 13, 1982, and to appoint FSLIC as receiver. Fidelity was never afforded a hearing to prove it met the qualifications on the same basis as other institutions.

REASONS FOR GRANTING THE WRIT

1. A Member/Shareholder of the Bank Has a Property Interest in Advances Which is Entitled to the Protection of Due Process of Law.

In a period when many financial institutions are being closed and their assets seized or they are being forced to merge into other institutions, it is important that the rights of the owners, the shareholders and investors be declared authoritatively on a nationwide basis.

At the risk of oversimplification, the first question boils down to whether Fidelity, a voluntary member of the Bank, had a property right in the form of its entitlement to advances. If advances are within the meaning and intent of that term, Fidelity is entitled to litigate its claim that due process was denied, and the financial community as a whole is entitled to know the true legal nature of the relationship between the Bank and its members. Fidelity does not claim that the Bank had no discretion, but that discretionary authority of the Bank is not plenary and is subject to procedural due process, based on specified standards or mutually explicit understandings that support its claim and are subject to proof in a hearing at some stage. The discretion of the Bank cannot be exempt from any review. The case is akin to *Perry v. Sinderman* (1972) 408 &.S. 593, rather than *Board of Regents v. Roth* (1972) 408 U.S. 564.

If availability of benefits is predicated upon stated standards or qualifications of statutes or regulations, the decision-making body must afford a hearing on the applicant's proof that the standards are met and must grant the entitlement if they are met. Such a right need not be previously vested; it is sufficient that there be a right to prove eligibility. *Goldsmith v. U.S. Board of Tax Appeals* (application for admission to practice) (1926) 270 U.S. 117; *Burt v. City of New York* (CA-2 1946) 156 F.2d 791 (architect's request for a permit); *Willner v. Committee on Character & Fitness* (1963) 373 U.S. 96 (admission to the bar); *Endler v. Schutzbank* (1968) 68 Cal.2d 162 (permission to work for licensed business); *Goldberg v. Kelly* (1970) 397 U.S. 254; and *Carey v. Quern* CA-7 1978) 588 F.2d 230, 232 (welfare benefits).

After the final decision by the Court of Appeals in this case, that Court decided *Allen v. Board of Pardons* (CA-9 1986) 792

F.2d 1404, holding that a Montana parole statute creates a due process liberty interest, because it provided that the Board of Pardons "shall" release a prisoner on parole when it determines release would not be harmful, unless specified conditions exist which would preclude parole. The statute created an expectancy which is a liberty interest entitling inmates to due process protection, because the Board was mandated by the word "shall" in the statute, despite broad discretion within the statutory limits. *Allen* followed *Greenholtz v. Nebraska Penal Inmates* (1979) 442 U.S. 1.

The *Allen* reasoning should have been applied here. § 7(j) states that the Bank "shall" make advances, subject to safety and reasonableness with regard to the claims and demands of other institutions and the maintenance of the credit standing of the Bank and its obligations. The Bank is mandated to act within those stated standards. The situation cannot be distinguished from *Greenholtz* or from *Allen,* even though a property interest rather than a liberty interest is at stake. No distinction between property interests and liberty interests have been made in the numerous decisions finding the common elements of entitlements in such diverse benefits as welfare allotments, pensions, admission to the bar or medical residency, land use permits and even utility service. Obviously, the Court of Appeals is inconsistent in finding a protectible interest in *Allen* and denying one to Fidelity. Absence of discretion is not a prerequisite of an entitlement.

The three conditions which give a benefit the dignity of an entitlement are (1) the eligibility of the applicant as a member of a class whose claims must be considered, (2) decision-making power by the agency to whom the claim is made, and (3) standards set by statute, regulation, explicit rules or mutual understandings between the parties by which the application is to be determined. A member of a Federal Home Loan Bank in the position of Fidelity meets those requirements.

Fidelity was a member of the small class eligible for advances. The Bank was established for the purpose of providing funds for members and (on less favorable terms) nonmembers engaged in the savings and loan business only. Fidelity became a member and stockholder voluntarily and otherwise qualified by reason of its organization, its agreement to be subject to inspection and regulation, its satisfaction of management and home-financing

policies, and its acceptance of the burdensome restraints on its business required by the Act, including limitations on rates of interest payable by its borrowers (§ 1425), its liquidity and assets (§ 1425a), its advertisements (§ 1425b) and submission to examinations (§ 1442). In addition the stock it had to purchase could be divested by the Bank upon removal from membership (§ 1426(i)).

Advances by the Bank are mandated, subject to the stated standards and conditions specified in Section 7(j). Section 9, the alleged source of unlimited power, must be harmonized with it, as in any statutory interpretation.

The primary purpose of the establishment of the whole system is reiterated in § 1425a, which states the intention to provide "meaningful and flexible liquidity in savings and loan associations." That section sets forth asset requirements which are subject to the Board, not the Bank, and authorizes the Board, not the Bank, to issue rules and regulations, all of which indicate limits on Bank discretion.

The Board has issued regulations (12 C.F.R. Part 500) which set forth its responsibility for administration and enforcement of the statute (§ 500.1) and prescribe additional conditions upon which a bank is authorized to make advances (§ 500.2). The regulations governing advances are in Part 525. § 525.1 states the limitation on advances. § 525.2 requires the Bank to adopt a policy on extension of credit and allows it to extend or deny credit consistent with that policy. § 525.3 requires rates of interest on advances to be set by the Board of Directors (not by employees of the Bank). Other sections of the same part relate to collateral and permit both long-term and short-term advances.

All of these provisions are superfluous and meaningless if the District Court is correct that advances can be refused "for no reason at all." On the other hand, these provisions together with the statute meet the requirements of stated standards and conditions which make an advancement a legally cognizable entitlement.

The decisions in this case have turned the statute and regulations upside down. Despite the limitations expressed by Congress on the system as a whole and the limitations upon regional banks

imposed by the Board which established them, the District Court has held that the Bank has unfettered and unlimited discretion.

This Court said in *Laurens F. S. & L. v. So. Carolina Tax Commission* (1961) 365 U.S. 517 at 521-522:

> "It [the Bank Act] set up a system of federally chartered Home Loan Banks for the purpose, as stated in the House and Senate Committee Reports, of placing 'long-term funds in the hands of local institutions' in order to alleviate the pressing need of home owners for 'low-cost, long-term, installment mortgage money' and to 'decrease costs of mortgage money' with a 'resulting benefit to home ownership in the form of lower costs and more liberal loans.' It is to this end that the Act authorizes the Federal Home Loan Banks to make 'advances' of funds to eligible borrower institutions 'upon the note or obligation' of the borrower secured primarily by mortgages on homes."

The only way that purpose can be achieved is to recognize that the key link between the federal advances and the homeowners is the savings and loan institutions. They must have a judicially reviewable right to get the advances. The system was not designed to work, and cannot be assured of working fairly and consistently, without the decisions of the federal home loan banks being subject to judicial review. The notion that a government bureaucracy can act or refuse to act "for no reason at all" is abhorrent. Congressional intent to commit agency action to unreviewable discretion must appear from clear and concise evidence. *Abbott Laboratories v. Gardner* (1967) 387 U.S. 136, 141.

A review of discretion is predicated on recognition of the right to advances as either an entitlement or as a contractual right. Neither requires any strain. By establishing methods for loans and advances to be applied for and to be made to institutions, by restricting other sources of funds, and by requiring standards of business operations to qualify for membership and for loans and advances, the rules were created which govern the obtaining of advances, thus making them entitlements. Fidelity was induced to become a member of the Bank and to submit to all of its regulations and restrictions, in reliance on the expectation that it would receive advances on the conditions of the statutes and regulations. Whether they are called rules or standards or mutu-

ally explicit understandings, they are the grounds of an entitlement, a right, not a mere privilege to supplicate. The authority to make the advances constitutes a duty to do so, subject to the prescribed conditions. That duty must be subject to a judicial examination either before, during or after its performance. Otherwise, a tyranny has been established which can be controlled only by the political process and not by the courts. That was not the intent of Congress.

The Administrative Procedure Act, 5 U.S.C. §§ 551, et seq. is irrelevant. There is no administrative procedure available to Fidelity which would be reviewable under that statute. Section 12 of that Act provides that it does not diminish constitutional rights or limit or repeal requirements otherwise recognized by law. Judicial review of agency action denying due process was actionable long before the A.P.A. was enacted. *Abbott Laboratories v. Gardner, supra,* 387 U.S. at 140. The deprivation of a property right alone is sufficient ground for Fidelity's cause of action, without any involvement of A.P.A. See *Greene v. McElroy* (1959) 360 U.S. 474 and *Willner v. Committee, supra,* 373 U.S. 96.

There is strong presumption of reviewability. Even the absence of a formal adjudicative hearing does not compel the conclusion that an administrative decision is unreviewable. *Medical Committee for Human Rights v. S.E.C.* (CA DC 1970) 432 F.2d 659, 668. The courts have jurisdiction to review administrative action in the absence of a clear indication that Congress intended otherwise (id. at 669). The presumption favoring reviewability can be overcome only by a strong showing that the issues raised are inappropriate for judicial consideration, that there is some overriding public policy need to safeguard the interest of the Bank, or that compelling the Bank to adhere to the standards of the statutes and the regulations of its own parent Board and to the restraint of due process would have a serious adverse impact on its effectiveness in carrying out its duties. None of these factors can be ruled on on a motion to dismiss. Furthermore, there is no indication in the Bank Act of a Congressional intent to preclude judicial review. Reviewing an abuse of discretion is not inconsistent with the legislative intent. See *Association of Data Processing, etc., Inc. v. F.H.L.B. Board* (CA-6 1977) 568 F.2d 478 and *Peoples v. U.S.D.A.* (CA DC 1970) 427 F.2d 561.

2. Fidelity Has a Contractual Right to Advances and Credit.

The allegations of fact in the complaint, even without the requested amendment which highlighted the legal theories of a contract claim, entitled Fidelity to have the claim determined under contract law as an alternative to the entitlement theory. It is error to dismiss a complaint for failure to plead the correct legal theory. A motion to dismiss should not be granted unless it appears to a certainty that the plaintiff can prove no set of facts in support of its claim that would entitle him due relief. *Bretz v. Kelman* (CA-9 1983) 722 F.2d 503, 504.

The elements of a contract cause of action are satisfied by the complaint. The Bank is a corporation under § 1422 and is subject to being sued. Fidelity is a shareholder and member under §§ 1422, 1424 and 1426. As there is a contract between any corporation and its shareholders, so there is one between the Bank and Fidelity. It is created by the documents governing the establishment and administration of the corporation, and it includes all of the relevant statutes and regulations among its terms and provisions. The elements of this principle can be traced back to *The Trustees of Dartmouth College v. Woodward* (1819) 4 Wheat. (U.S.) 514 and *Clearwater v. Meredith* (1864) 1 Wall. (68 U.S.) 25. The modern rule is well established.

As in any contract, even without the explicit restraints of § 7(j) as to fairness and non-discrimination, each party has a duty to perform its obligations in good faith and to deal fairly, because a covenant to do so is implied in every contract. *Riess v. Murchison* (CA-9 1974) 503 F.2d 999, 1012, c.d. 420 U.S. 993 and *Sessions, Inc. v. Morton* (CA-9 1974) 491 F.2d 854, 857. Good faith and fair dealing require both refraining from discrimination and affirmative action in accordance with the standard of reasonableness.

The requested amendment to the complaint was an attempt to focus the attention of the court on legal theories, although the court had an obligation to consider them whether or not they were pleaded. The claim for declaration of rights in the original complaint was adequate. It asserted that the Bank had taken certain actions in violation of Fidelity's rights, including action without notice or an opportunity to be heard and the existence of an actionable, justiciable controversy. The remedy of declaratory

judgment was created by 28 U.S.C §§ 2201 and 2202 to permit a determination of contract rights, and it is not exclusive of other relief. Whether or not the complaint was amended, it was an abuse of discretion by the District Court not to consider the legal theories pleaded in them, because the facts had been pleaded from the outset.

The Court of Appeals undertook a discussion of whether governmental action was involved, but aborted the issue and did not discuss *Laurens, supra,* or *Association of Data Processing etc., Inc., supra.* If *Jackson v. Metropolitan Edison Co.* (1974) 419 U.S. 345 affects the relationship between the Bank and one of its members so that actions of the Bank are not governmental action, *Laurens* and *Association of Data Processing* must be reconciled or overruled.

The lower courts did not face up to the dilemma they created by raising an issue of Bank action as governmental action. Even if it were, so that the entitlement cases do not govern, then the non-governmental action must be reviewable as a breach of contract. If the Board could escape through a non-governmental action loophole, it is caught by the remedy for breach of contract which applies to any corporation. If the right of Fidelity was not an entitlement because the Bank's action is non-governmental, then Fidelity clearly had a justiciable contract right, which both courts refused to recognize, but which is important to clarify for the whole financial community.

CONCLUSION

The decision of the Court of Appeals is an aberration which cannot be allowed to stand. It has made a federal home loan bank (at least in the Ninth Circuit) a unique institution, with plenary discretion, unfettered by judicial review, to grant or deny advances to member institutions "for no reason at all." To reach such an unprecedented result, giving a federal home loan bank immunity from judicial review, the District Court and Court of Appeals both ruled inconsistently with the prior Court of Appeals decision in this same case and with the latter's subsequent opinion in *Allen*. It is timely to correct the error, for the spectre of plenary discretion faces every one of the troubled savings and loan institutions which is a borrower from a federal home loan bank.

We respectfully submit that a writ of certiorari should issue.

DATED: October 25, 1986

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APPENDIX A

Fidelity Financial Corporation,
Plaintiff-Appellant

v.

Federal Home Loan Bank of San Francisco,
Milton Feinerman, President
of the Federal Home Loan Bank of S.F., et al.,
Defendants-Appellees.

No. 84-2634.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Jan. 14, 1986.

Decided June 27, 1986.

Before GOODWIN, WALLACE, and ALARCON, circuit Judges.

WALLACE, Circuit Judge:

Fidelity Financial Corporation appeals from the district court's final judgment in favor of the Federal Home Loan Bank of San Francisco (the Bank) in its action against the Bank for failure to provide regular credit advances. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

Fidelity Financial Corporation is the parent corporation of Fidelity Savings and Loan Association (Fideltiy), a state-chartered thrift institution.[1] The Bank is one of twelve regional Federal Home Loan Banks that form part of the Federal Home Loan Bank System, which was created by Congress in 1932 to provide a reliable source of funds to homebuyers. *See* Federal Home Loan Bank Act, 12 U.S.C. §§ 1421-1449 (the Bank Act). The Bank operates as the central credit facility for its member financial institutions. Primarily from funds obtained through the

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[1]For the sake of simplicity, we hereafter refer to Fidelity as if it were suing in its own behalf. We have no need to take further account of the separate corporate status of Fidelity Financial Corporation.

sale of the consolidated obligations of all Federal Home Loan Banks, the Banks is able to provide "advances" — loans made on the security of home mortgages — to its members, which are required by law to purchase and maintain a certain level of Bank stock. *See* 12 U.S.C. § 1426(c)(1). The Bank operates under the supervisory and regulatory authority of the Federal Home Loan Bank Board (the Bank Board), an independent federal agency. 12 U.S.C. § 1437.

Fidelity was a member institution of the Bank. In October 1979, Fidelity applied to the Bank for a $75 million regular short-term credit advance. Pursuant to its credit program adopted in 1975, the Bank denied the application on the ground that Fidelity was overcommitted (i.e., its loan commitments were not reasonably related to its anticipated inflow of funds). Instead, the Bank offered Fidelity its "Other Special Credit" option (OSC). Under OSC, a member could obtain funds for up to a year at interest rates equal to the Bank's regular rate plus 2%. A member was required to repay completely its outstanding OSC advances before it could again become eligible for regular credit. Fidelity applied for and obtained a $60 million OSC advance.

In December 1979, Fidelity requested reconsideration of its OSC classification. After the Bank determined that Fidelity was still ineligible, Fidelity continued to accept substantial OSC advances. In February 1980, the Bank again determined that Fidelity did not qualify for regular credit, but accorded Fidelity a special waiver of the extra 2% OSC interest charge. Fidelity proceeded to obtain further advances totaling hundreds of millions of dollars. In October 1980, the Bank reinstated the extra 2% on future OSC advances, but in February 1981, the Bank suspended the 2% charge for all member borrowers, including Fidelity.

In March 1982, Fidelity reported a net loss of $57 million for the prior fiscal year. In response, depositors withdrew massive amounts from Fidelity — nearly $70 million in the first week of April alone. At this time, the Bank determined that Fidelity's outstanding OSC advances approached $1.4 billion. On April 9, the executive committee of the Bank's board of directors decided that the Bank would make no further advances to Fidelity. Four

days later, the State of California placed Fidelity's assets in receivership.

Fidelity sued the Bank in district court, alleging, in part, that the Bank's denial of regular credit to Fidelity was in violation of procedural due process and of common law fiduciary duties owed Fidelity. On the Bank's motion to dismiss for failure to state a claim upon which relief could be granted, the district court dismissed the claim based on procedural due process; it declined, however, to dismiss the claim of breach of common law fiduciary duty. *Fidelity Financial Corp v. Federal Home Loan Bank,* 589 F.Supp 885 (N.D.Cal. 1983). After more than two years of discovery, the district court granted summary judgment for the Bank on the fiduciary duty claim, ruling that Fidelity had presented no evidence that the Bank's credit decisions were in bad faith or grossly negligent. Fidelity then moved to amend its complaint to allege breach of contract and breach of an implied covenant of good faith and fair dealing. The district court denied the motion.

II

Fidelity argues that the Bank's refusal to provide Fidelity regular credit advances violated its fifth amendment right to due process. The district court dismissed this claim for failure to state a claim upon which relief could be granted. The district court found two separate bases for this dismissal. First, it held that the Bank's actions did not constitute governmental action. Second, it determined that Fidelity had no protectible property interest in receiving regular credit advances. We review de novo the district court's dismissal for failure to state a claim upon which relief may be granted. *Guillory v. County of Orange,* 731 F.2d 1379, 1381 (9th Cir. 1984). We may affirm only if it appears to a certainty that Fidelity would be entitled to no relief under any state of facts that could be proved. *Halet v. Wend Investment Co.,* 672 F.2d 1305, 1309 (9th Cir. 1982).

A.

The fifth amendment protects Fidelity against only federal governmental action. If, as the district court ruled, the Bank's actions did not constitute governmental action, Fidelity has not stated a claim upon which relief can be granted.

Whether the Bank's actions at issue constitute governmental action is not clear. On one hand, the Bank is privately owned and privately funded. It receives no government money, and its consolidated obligations are not guaranteed by the government. It is engaged in the business of making loans, which must be sound so that its obligations will be marketable. Its employees are not in the civil service, and it does not perform regulatory functions.

On the other hand, the Bank was created by a federal government agency, the Bank Board, to accomplish federal objectives and is closely regulated in order to promote these objectives. In addition, the Bank is subject to unusually extensive managerial supervision by the Bank Board: among other functions, the Bank Board appoints six of the Bank's fourteen directors, 12 U.S.C. § 1427(a), designates the Bank's chairman and vice chairman, 12 U.S.C. § 1427(g), and has the power to suspend or remove the Bank's directors, officers, employees, and agents. 12 U.S.C. § 1437.

Supreme Court precedent provides instructive guidance on this issue. The fact that a business is subject to extensive and detailed regulation does not alone render its actions governmental. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350, 95 S.Ct. 449, 453, 42 L.Ed.2d 477 (1974) (*Jackson*). Rather, "the inquiry must be whether there is a sufficiently close nexus between the [government] and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the [goverhment] itself." *Id.* at 351, 95 S.Ct. at 543. This nexus may be established by showing that the government exercised such coercive power or such significant encouragement that it is responsible for the specific private conduct challenged, or by showing that the private entity has exercised powers that are traditionally the exclusive prerogative of the government. *Blum v.*

Yaretsky, 457 U.S. 991, 1004-05, 102 S.Ct. 2777, 2785-86, 73 L.Ed.2d 534 (1982).

Fidelity does not allege that the Bank Board (or any other governmental agency) coerced or encouraged the Bank's specific denials of regular credit; on the contrary, Fidelity contends that the Bank has failed to comply with Bank Board regulations. Nor does it seem that the Bank's business of making loans can be characterized as a traditionally exclusive sovereign activity. It therefore appears questionable whether the challenged Bank actions may be deemed governmental. *See, e.g., Warren v. Government National Mortgage Association*, 611 F.2d 1229, 1232-35 (8th Cir.) (GNMA foreclosure did not constitute governmental action, even though the GNMA was also wholly owned by the government), *cert. denied*, 449 U.S. 847, 101 S.Ct. 133, 66 L.Ed.2d (1980); *Northrip v. Federal National Mortgage Association*, 527 F.2d 23, 30-33 (6th Cir. 1975) (although the FNMA was subject to extensive regulatory and supervisory control, had five of its fifteen directors appointed by the government, and had many employees subject to the civil service laws, its act of foreclosure did not constitute governmental action); *accord Roberts v. Cameron-Brown Co.*, 556 F.2d 356, 358-60 (5th Cir. 1977). *But cf. Rust v. Johnson*, 597 F.2d 174, 177-78 (9th Cir.) (suggesting that Federal Home Loan Banks may be federal instrumentalities for supremacy clause purposes), *cert. denied*, 444 U.S. 964, 100 S.Ct. 450, 62 L.Ed.2d 376 (1979); *Fahey v. O'Melveny & Myers*, 200 F.2d 420, 446, 454 (9th Cir. 1952) (ruling, pre-*Jackson*, that Federal Home Loan Banks are "governmental banking agencies" in the context of determining that the banks do not have due process rights against the government), *cert. denied*, 345 U.S. 952, 73 S.Ct. 866, 97 L.Ed. 1374 (1953). We need not resolve this issue, however, for we find that the district court's second ground clearly disposes of Fidelity's procedural due process claim.

B.

Fidelity argues that it had a protectible property interest in receiving advances under the Bank's regular credit terms. To have a property interest in receiving regular credit advances, Fidelity

must show that existing rules and understandings gave fidelity a "legitimate claim of entitlement" to such advances. *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). Where the decision to confer a benefit is unconstrained by "'particularized standards or criteria,'" no entitlement exists. *Olim v. Wakinekona*, 461 U.S. 238, 249, 103 S.Ct. 1741, 1747, 75 L.Ed.2d 813 (1983), *quoting Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 467, 101 S.Ct. 2460, 2466, 69 L.Ed.2d 158 (1981) (Brennan, J., concurring); *see Baumann v. Arizona Department of Corrections*, 754 F.2d 841, 845 (9th Cir. 1985); *Jacobson v. Hannifin*, 627 F.2d 177, 180 (9th Cir. 1980); *City of Santa Clara v. Andrus*, 572 F.2d 660, 676 (9th Cir.), *cert. denied*, 439 U.S. 859, 99 S.Ct. 177, 58 L.Ed.2d 167 (1978).

Fidelity does not deny that it was ineligible for regular credit advances under the terms of the Bank's established credit program. Instead, it argues that the Bank Act and Bank Board regulations conferred on Fidelity an entitlement to receive regular credit advances.

The Bank Act does not impose particularized standards or criteria that significantly constrain the Bank's discretion to deny or condition advances. On the contrary, the Bank Act clearly reposes broad discretion in the Bank. Under section 9 of the Bank Act, Fidelity is merely "entitled *to apply* . . . for advances"; the Bank "may *at its discretion* deny any such application, or, subject to the approval of the board, may grant it on such conditions as the [Bank] may prescribe." 12 U.S.C. § 1429 (emphasis added). Similarly, section 7(j) simply requires that the Bank's board of directors exercise its discretion prudently in making advances:

> Such board of directors shall administer the affairs of the bank fairly and impartially and without discrimination . . . and shall . . . extend to each institution . . . such advances as may be made safely and reasonably with due regard for the claims and demands of other institutions, and with due regard to the maintenance of adequate credit standing for the Federal Home Loan Bank and its obligations.

12 U.S.C. § 1427(j).

Fidelity's alleged entitlement to regular credit advances is equally unsupported by the Bank Board regulation then governing advances. *See* 12 C.F.R. § 531.1 (1982). This regulation highlighted the Bank's discretion:

> Banks *may* make advances to members, subject to regulations and restrictions the Board may prescribe. *Access by members to advances is a privilege* which may be limited under the Act.

12 C.F.R. § 531.1(a) (1982) (emphasis added).

We therefore conclude that the Bank's discretion was so unconstrained by specific limiting criteria that it did not give rise to a property interest in receiving regular credit advances. Therefore, even assuming that the Bank's actions may be deemed governmental, we hold that the district court properly dismissed the procedural due process claim.

III

On the Bank's motion to dismiss for failure to state a claim upon which relief could be granted, the district court held that Fidelity had a federal common law claim for breach of fiduciary duty. The court ruled that the Bank's officers and directors owed fiduciary duties to fidelity as shareholder and that the Bank was derivatively liable to Fidelity. In later granting summary judgment for the Bank on this claim, the court ruled that Fidelity had failed to present any evidence that the Bank's officers and directors had acted in bad faith or in a grossly negligent manner, and that the "business judgment" rule therefore insulated the Bank from liability.

Fidelity argues on appeal that the "business judgment" rule does not apply and that the Bank should bear the burden of proving that its dealings with Fidelity were fair. The Bank, supported by amicus briefs from the Bank Board and the eleven other Federal Home Loan Banks, argues that the Bank's officers and directors did not owe Fidelity any federal common law fiduciary duty in determining whether to make loans to it. It

further argues that if a fiduciary duty was owed, the district court properly applied the "business judgment" rule.

We review de novo the district court's summary judgment. *Lojek v. Thomas,* 716 F.2d 675, 677 (9th Cir. 1983). We must determine whether there is any genuine issue of material fact and whether the substantive law was correctly applied. *Id.* We may affirm the district court on a ground not selected by the district judge so long as the record fairly supports such an alternative disposition of the issue. *See city of Las Vegas v. Clark County,* 755 F.2d 697, 701 (9th Cir. 1985).

We need not reach the question of whether the Bank's actions measured up to a federal common law fiduciary duty, because we agree with the bank that Fidelity had no such claim under federal common law. The instances in which federal courts may formulate federal common law are "few and restricted." *Wheeldin v. Wheeler,* 373 U.S. 651, 83 S.Ct. 1441, 1444, 10 L.Ed.2d 605 (1963). "[A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases.' " *Texas Industries, Inc. v. Radcliff Materials, Inc.,* 451 U.S. 630, 641, 101 S.Ct. 2061, 2067, 68 L.Ed.2d 500 (1981) (footnotes omitted).

The district court and fidelity do not identify, and we do not perceive, any congressional authorization to federal courts to formulate substantive rules of decision governing the Bank's liability. In addition, this case does not implicate any of the narrow areas in which a "federal rule of decision is 'necessary to protect uniquely federal interests.' " *Id.* at 640, 101 S.Ct. 2067, *quoting Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 426, 84 S.Ct. 923, 939, 11 L.Ed.2d 804 (1964). Only the rights and obligations of two private corporations are at stake. While there is a general federal interest in the functioning of the Federal Home Loan Bank System, this interest is insufficient to warrant formulation of federal common law in this case. *Cf. id.* at 642, 101 S.Ct. at 2067 (federal interest in vindication of antitrust rights does not warrant creation of federal common law where dispute does not

involve duties of federal government or other uniquely federal interest); *Bank of America National Trust & Savings Association v. Parnell,* 352 U.S. 29, 33-34, 77 S.Ct. 119, 121-122, 1 L.Ed.2d 93 (1956) (federal interest in government paper is too remote to warrant formulation of federal common law where dispute is purely between private parties). We therefore reject Fidelity's challenge to the entry of summary judgment in favor of the Bank on Fidelity's claim of breach of a federal common law fiduciary duty.

IV

After the district court announced its decision to grant summary judgment for the Bank, Fidelity sought leave to file a fourth amended complaint alleging that the Bank's credit decisions constituted a breach of contract and a breach of an implied covenant of good faith and fair dealing. The district court, finding that the new claims merely restated earlier claims and that permitting amendment would impose a prejudicial burden on the Bank, denied the motion. We review for abuse of discretion the denial of a motion for leave to amend. *Klamath-Lake Pharmaceutical Association v. Klamath Medical Service Bureau,* 701 F.2d 1276, 1292 (9th Cir.), *cert. denied,* 464 U.S. 822, 104 S.Ct. 88, 78 L.Ed.2d 96 (1983).

The district court's discretion to deny leave to amend is particularly broad where the court has already given the plaintiff an opportunity to amend his complaint. *Mir. v. Fosburg,* 646 F.2d 342, 347 (9th Cir. 1980). Moreover, we agree with the district court that Fidelity was simply restating its prior claims under new labels. The factual bases of the claims were known to Fidelity long before. Further, the district court found that the Bank would be prejudiced if the motion were granted. Under these circumstances, the district court did not abuse its discretion in denying the motion.

AFFIRMED.

APPENDIX B

FIDELITY SAVINGS AND LOAN ASSOCIATION,
Plaintiff-Appellee, Cross-Appellant,

v.

FEDERAL HOME LOAN BANK BOARD,
Federal Savings and Loan Insurance Corporation, et al.,
Defendants-Appellants, Cross-Appellees.

Nos. 82-4337, 82-4354.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted July 15, 1982.

Decided Sept. 2, 1982

Rehearing and Rehearing En Banc
Denied Nov. 8, 1982.

Before CHOY, SNEED, and FARRIS, Circuit Judges.

SNEED, Circuit Judge:

This appeal has its origin in a dispute over the appointment of the Federal Savings and Loan Insurance Corporation (FSLIC) as federal receiver for a state-chartered association, Fidelity Savings and Loan Association (Fidelity). The Savings and Loan Commissioner for the State of California (Commissioner) seized Fidelity for the purpose of liquidation and appointed the FSLIC state receiver. Subsequently, the Federal Home Loan Bank Board (Bank Board) appointed the FSLIC federal receiver pursuant to 12 U.S.C. § 1729(c)(2). The Bank Board and the FSLIC, defendants below and appellants here, appeal from the district court's holding that they improperly seized Fidelity and from that court's order for the return of certain assets held by the federal receiver to Fidelity. Jurisdiction in the district court was based on 12 U.S.C. § 1464(d)(6)(A). Our jurisdiction is based on 28 U.S.C. § 1292(b). Because we find that appellants satisfied the statutory requirements for the appointment of a federal receiver, 12 U.S.C. § 1729(c)(2)(A), (C), we reverse and remand for further proceedings.

I

FACTS AND BACKGROUND

In 1979 Fidelity began experiencing severe financial difficulties as a result of its prior speculative loan commitment practices. Gambling that interest rates would fall, Fidelity had sold large amounts of short-term paper in order to obtain the funds to make long-term mortgage loans at then current market rates. When interest rates rose sharply, Fidelity suffered substantial operating losses and a decrease in net worth because the earnings on its low-yielding portfolio were less than the increasing cost of its short-term borrowing.

To meet its financial obligations, Fidelity borrowed in excess of $1.3 billion from the Federal Home Loan Bank of San Francisco by March 1982.[1] Fidelity's decline caused its depositors to withdraw nearly $70 million in deposits during the week of April 5, 1982. On April 9 the Bank advised the FSLIC that no further loans would be advanced to Fidelity unless the FSLIC guaranteed the loans. The FSLIC declined to advance the loan guarantees, and informed the California Savings and Loan Commissioner of its decision.

In light of Fidelity's precarious financial posture, the Commissioner decided to place the ailing institution in receivership and appoint the FSLIC as receiver for the state. At the close of business on April 13, 1982, state officials physically seized Fidelity by entering its offices in Oakland at approximately 4:40 p.m.

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[1]These loans were made pursuant to a special credit program by which Fidelity was charged interest penalties and higher interest rates than other borrowing institutions. On April 9, 1982, after being notified that the Bank would not extend any more loans to it, Fidelity filed suit against the Federal Home Loan Bank of San Francisco in the Federal District Court for the Northern District of California, No. C82-1389 EFL, seeking recovery of the penalties and excess interest charges. As part of the remedy in the instant case, the district court ordered the lawsuit transferred from the federal receiver to Fidelity.

and serving Fidelity with papers ordering its liquidation.[2] The

[2]The Commissioner's order taking possession of the property reads as follows (schedules omitted):

> I, LINDA TSAO YANG, Savings and Loan Commissioner of the State of California, pursuant to the authority vested in me under the Savings and Loan Association Law (Financial Code section 5000 et seq.), and in particular section 9001 of the California Financial Code, find that Fidelity Savings and Loan Association (sometimes hereafter referred to as "Association"), a corporation organized under the laws of the State of California and licensed by the Savings and Loan Commissioner, is:
>
> (1) In an unsafe condition;
>
> (2) Conducting its business in an unsafe manner;
>
> (3) Conducting its business in an injurious manner.

Each of the above three findings render further conduct of Fidelity Savings and Loan Association's business to be hazardous to the public and its investors.

My findings are based upon facts and information that have been brought to me as a result of an examination by the Department of Savings and Loan of the condition of Fidelity Savings and Loan Association, and of reports received by me, all of which facts and information confirm that Fidelity Savings and Loan Association is in an unsafe condition, is conducting its business in an unsafe and injurious manner such as to render its further proceeding hazardous to the public and its investors. The facts and information underlying the above findings include, but are not limited to, the following:

> (a) California Financial Code section 6900 and section 235.48 of the Savings and Loan Commissioner's Regulations (10 Cal. Admin. Code § 235.48) specify that the minimum statutory net worth of a California-licensed savings and loan association shall be three percent (3%) of the average of its total assets as of the end of its last five calendar years. The statutory net worth of Fidelity Savings and Loan Association at March 31, 1982 was 0.93 percent of the average total assets.
>
> (b) The net worth of Fidelity Savings and Loan Association has eroded from $91,600,000.00 at January 1, 1981 to $19,600,000.00 at March 31, 1982. The net worth of the Association has continued to

Commissioner subsequently appointed the FSLIC as state re-

deteriorate and, if the average monthly operating loss of $5,000,000.00 continues or accelerates, the Association will exhaust its entire net worth on or before July, 1982.

(c) The Association has booked net operating losses of $1,400,000.00 for the year ended December 31, 1980, $57,000,000.00 for the year ended December 31, 1981 and $15,000,000.00 for the three months ended March 31, 1982.

(d) During the past year the Association has suffered significant outflows of savings deposits, and these outflows were funded by advances (borrowings) from the Federal Home Loan Bank of San Francisco (FHLB). The Association's need for cash funds has greatly increased due to the substantial daily withdrawals of savings deposits and of secured money funds. Exhibit A, attached hereto and incorporated herein, illustrates the savings outflow and the borrowing pattern of the Association. Exhibit B, attached hereto and incorporated herein, illustrates the steady outflow of funds for the week of April 5, 1982.

The Association has total borrowings of $1,409,116,000 from the FHLB as of April 12, 1982. The Association no longer has the ability to borrow from the FHLB and there are no other known sources for the borrowings required for the Association to operate.

There are certificates of deposit and secured money funds, which are obligations of the Association, due to mature on or before April 23, 1982 which total $73,205,000.00. Exhibit C, attached hereto and incorporated herein, illustrates the potential cash needs of the Association through, and including, April 23, 1982. Based on the experience of recent weeks, nearly all of the cash from the certificates of deposit and secured money funds will be withdrawn from the Association as they mature.

(e) The Association has had negative operating spreads since November, 1980. A negative operating spread occurs when the average interest rate paid on savings and borrowings exceed the yield rate on loans and investments. The operating spread at February 28, 1982 is a negative 2.82.

(f) The Federal Savings and Loan Insurance Corporation ("FSLIC") the federal agency that insures accountholders of Fidelity Savings and Loan Association, has requested that the

board of directors of Fidelity Savings and Loan Association grant to FSLIC authority to merge Fidelity Savings and Loan Association into another association to protect accountholders and limit the potential liability of FSLIC. That request was refused by the board of directors of Fidelity Savings and Loan Association.

THEREFORE, pursuant to each of said findings, and to the provisions of Section 9001 of the California Financial Code and the Savings and Loan Association Law, I, LINDA TSAO YANG, as Savings and Loan Commissioner of the State of California, hereby make demand to, and do, take possession of the property, business and assets of, Fidelity Savings and Loan Association of California. You are hereby ordered to immediately deliver into my possession, and that of my authorized representatives, the property, business and assets of Fidelity Savings and Loan Association. Refusal to comply with this order is a misdemeanor as provided by Financial Code Section 9005.

The Commissioner's order of liquidation reads as follows:

I, LINDA TSAO YANG, being the duly appointed and qualified Savings and Loan Commissioner of the State of California, and, acting in such capacity; having taken possession of the property, business and assets of Fidelity Savings and Loan Association; and based on all facts, information and reports available to me, including, but not limited to the facts and information listed as points a. through f. of my Order Demanding And Taking Possession Of Property, Business, And Assets Of Fidelity Savings and Loan Association, which are incorporated herein by reference, do hereby find;

(1) That it would be unsafe, unsound, and injurious to continue the business operations of Fidelity Savings and Loan Association; and

(2) That it is in the best interests of accountholders, investors, and the public that Fidelity Savings and Loan Association be liquidated.

NOW, THEREFORE, pursuant to Article 1 (commencing with section 9000) and Article 3 (commencing with section 9100), Chapter 17, Division 2 of the California Financial Code, I, Linda Tsao Yang, being the duly appointed and qualified Savings and

(West 1981).[3] At approximately 5:00 p.m., the Bank Board made an independent appointment of the FSLIC as federal receiver pursuant to 12 U.S.C. § 1729(c)(2). This appointment abrogated the Commissioner's ability to control or terminate the receivership. 12 U.S.C. § 1464(d)(6)(A); 12 C.F.R. § 569a.4 (1982). Fidelity's assets were then transferred to a newly created federal mutual association, Fidelity Federal Savings and Loan Association of San Francisco (Fidelity Federal).[4] The entire operation took less than thirty minutes. Fidelity's business was not significantly disrupted.

Loan Commissioner of the State of California, and, acting in such official capacity, do hereby order that Fidelity Savings and Loan Association be liquidated.

[3]The Commissioner's appointment of FSLIC as receiver reads as follows:

> I, LINDA TSAO YANG, being the duly appointed and qualified Savings and Loan Commissioner of the State of California, and, acting in such official capacity, have taken possession of the property, business and assets of Fidelity Savings and Loan Association pursuant to my Order Demanding and Taking Possession of Property, Business and Assets of Fidelity Savings and Loan Association.
>
> The accounts of Fidelity Savings and Loan Association are insured by the Federal Savings and Loan Insurance Corporation. Based on all the information and reports available to me, I believe it to be necessary and advisable to tender to the Federal Savings and Loan Insurance Corporation the appointment as receiver of Fidelity Savings and Loan Association.
>
> NOW, THEREFORE, pursuant to Fiancial Code sections 9009 and 9102, I, Linda Tsao Yang, being the duly appointed and qualified Savings and Loan Commissioner of the State of California, and, acting in such official capacity, do hereby tender to the Federal Savings and Loan Insurance Corporation the appointment as receiver for liquidation of Fidelity Savings and Loan Association.

[4]With the FSLIC's financial assistance, Fidelity Federal has carried on the business of Fidelity from April 13, 1982 to the present.

On April 19, 1982, Fidelity filed this action pursuant to 12 U.S.C. § 1464(d)(6)(A) for removal of the federal receiver and for such equitable relief as necessary to return Fidelity to the position it occupied prior to the appointment. Fidelity argued that the Bank Board had failed to satisfy the three preconditions for federal intervention under 12 U.S.C.§ 1729(c)(2). The district court ordered the trial bifurcated. The first issue to be addressed was whether the Bank Board had satisfied the preconditions for the appointment of a federal receiver set forth in 12 U.S.C. § 1729(c)(2)(A) and (C). The second issue, not yet reached by the district court, is whether the Bank Board satisfied the requirement of 12 U.S.C. § 1729(c)(2)(B) before it appointed the FSLIC as federal receiver.[5]

The district court, 540 F.Supp. 1374, held that the Bank Board had not met the statutory prerequisites for the appointment of a federal receiver. The court found that there had not been a closing under state law and that no depositor had been unable to withdraw his funds. The court ordered the Bank Board to remove the federal receiver and return to Fidelity certain assets in the possession of the federal receiver.[6] This appeal followed.

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[5]Section 1729(c)(2)(B) requires that the Bank Board determine that one or more of the grounds specified in 12 U.S.C. § 1464(d)(6)(A) exists before it may appoint the FSLIC federal receiver. These grounds include (i) insolvency in that the assets of the association are less than its obligations to its creditors and others, including its members; (ii) *substantial dissipation of assets or earnings due to* any violation or violations of law, rules, or regulations, or to *any unsafe or unsound practice or practices;* (iii) *an unsafe or unsound condition to transact business;* (iv) willful violation of a cease-and-desist order which has become final; (v) concealment of books, papers, records, or assets of the association or refusal to submit books, papers, records, or affairs of the association for inspection to any examiner or to any lawful agent of the Board (emphasis added). 12 U.S.C. § 1464(d)(6)(A)(i)-(v).

[6]Specifically, the assets ordered transferred to Fidelity are a lawsuit against the San Francisco Bank, *see supra* note 1, and a claim for the net worth, if any, of Fidelity on April 13, 1982.

II.

ISSUES TO BE RESOLVED

The issues before us are legal; therefore, our review is *de novo*. *First Charter Financial Corp. v. United States*, 669 F2d 1342, 1345 (9th Cir. 1982). Substantial deference, however, is ordinarily due a contemporaneous interpretation of the statute by the agency responsible for its administration, as we have before us here. *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965); *Sierra Pacific Power Co. v. EPA*, 647 F.2d 60, 65 (9th Cir. 1981). That interpretation by the Bank Board is that the closing and withdrawal requirements of section 1729(c)(2)(A) and (C) are satisfied whenever the FSLIC is appointed as state receiver for the purpose of liquidation.

The statutory setting in which these requirements appear is as follows. The Home Owners' Loan Act, 12 U.S.C. §§ 1461-1468 (1976 & Supp. I 1977), and the National Housing Act, 12 U.S.C. §§ 1701-1750g (1976 & Supp. I 1977), give the Bank Board and the FSLIC regulatory authority over federal savings and loan associations and, to a lesser extent, over state-chartered associations whose accounts are insured by the FSLIC. The FSLIC may become the receiver for a state-chartered savings and loan by one of two means. Section 1729(c)(1) authorizes the FSLIC to accept an appointment by a state to act as state receiver for the purpose of liquidation if a state-chartered association is in default. "Default" is defined by section 1724(d) to mean an adjudication or determination by a proper authority "pursuant to which a conservator, receiver, or other legal custodian is appointed for an insured institution for the purpose of liquidation." Under these circumstances section 1729(c)(1) vests the FSLIC with the same powers given it by section 1729(b) over federally chartered savings and loans, subject to the regulation of the public authority that appointed it. *See* 12 U.S.C. § 1729(d); *Hancock Financial Corp. v. Federal Savings & Loan Insurance Corp.*, 492 F.2d 1325, 1327 (9th Cir. 1974). Section 1729(c)(2) authorizes the Bank Board to "federalize" the receivership of a state-chartered association by appointing the FSLIC receiver (and thus ending state control of the receivership) provided that the section's three statutory preconditions have been satisfied: (1) that either a state

receivership has been in place for at least fifteen days or an insured institution has been closed under state law; (2) that at least one ground specified in 12 U.S.C. § 1464(d)(6)(A) exists with respect to such institution; and (3) that a depositor has been unable to make a withdrawal of his account.[7]

The exclusive means for contesting the appointment of the FSLIC as federal receiver under section 1729(c)(2) is provided by 12 U.S.C. § 1464(d)(6)(A), made applicable by 12 U.S.C. § 1729(c)(3)(A).[8] This section authorizes the district court to conduct a hearing "upon the merits" concerning the propriety of

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[7]12 U.S.C. § 1729(c)(2) provides:

> (2) In the event the Federal Home Bank Board determines —
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> (A) that (i) a conservator, receiver, or other legal custodian (whether or not the Corporation) has been or is hereafter appointed for an insured institution which is not a Federal savings and loan association other than by the Board (whether or not such institution is in default) and that the appointment of such conservator, receiver, or custodian, or any combination thereof, has been outstanding for a period of at least fifteen consecutive days, or (ii) an insured institution (other than a Federal savings and loan association) has been closed by or under the laws of any State;
>
> (B) that one or more of the grounds specified in paragraph (6)(A) of section 1464(d) of this title, existed with respect to such institution at the time a conservator, receiver, or other legal custodian was appointed, or at the time such institution was closed, or exists thereafter during the appointment of the conservator, receiver, or other legal custodian or while the institution is closed; and
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> (C) that one or more of the holders of withdrawable accounts in such institution is unable to obtain a withdrawal of his account, in whole or in part;
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> the Board shall have exclusive power and jurisdiction to appoint the Corporation as sole receiver for such institution.

[8]12 U.S.C. § 1474(d)(6)(A) provides:

> The Board shall have exclusive power and jurisdiction to appoint a conservator or receiver .... In the event of such appointment, the association may, within thirty days thereafter, bring an action in the United States court ... for an order requiring the Board to remove such conservator or receiver, and the court shall upon the

the appointment of the federal receiver under 12 U.S.C. § 1729(c)(2). Upon a finding that one or more of the conditions for appointment of the federal receiver have not been satisfied, the district court shall order the Bank Board to remove the FSLIC as federal receiver.

This case, therefore, turns on whether the "closing" and the "withdrawal" requirements of said sections 1729(c)(2)(A) and (C) were satisfied. We hold that each should be resolved by finding that the requirement has been satisfied.

III.

CLOSING OF FIDELITY UNDER CALIFORNIA LAW

A. *Power To Close Under California Law*

The district court held that no closure occurred within the meaning of section 1729(c)(2)(A). It reasoned that the Commissioner had no express or implied power to close Fidelity under California law. In addition, the district court found that even if it were to imply the power to close Fidelity from California Financial Code § 9010, the Commissioner, under California law, was stayed from exercising the power for ten days following seizure in order to allow the association to seek judicial review. We disagree.

The Commissioner may take possession of a savings and loan association operating in an unsafe or injurious manner and conduct its business until control is returned to the association or the association's affairs are liquidated. Cal. Fin. Code §§ 9001, 9002, 9011 (West 1981); *Pacific States Savings & Loan Co. v. Hise*, 25 Cal.2d 822, 835-36, 155 P.2d 809 (1945) (en banc). Admittedly, no provision in the Financial Code expressly states that the Commissioner may close an association. The California Supreme Court, however, has broadly construed the statutory powers of the Commissioner. *Evans V. Superior Court*, 20 Cal.2d 186, 190-91, 124 P.2d 820 (1942) (*Evans II*); *Evans v. Superior Court*, 14 Cal.2d 563, 572, 96 P.2d 107 (1939), *appeal dismissed*, 309 U.S. 640, 60 S.Ct. 893, 84 L.Ed. 995 (1940) (*Evans I*); *Wilson v.*

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merits dismiss such action or direct the Board to remove such conservator or receiver.

Superior Court, 2 Cal.2d 632, 635-37, 43 P.2d 286 (1935). Recognizing the legislature's intent to provide a comprehensive plan for supervising state savings and loans, *Trede v. Superior Court*, 21 Cal.2d 630, 633-34, 134 P.2d 745, *cert. denied, Pacific States Savings & Loan Co. v. Trede*, 320 U.S. 739, 64 S.Ct. 39, 88 L.Ed. 438 (1943), the California Supreme Court has found that the Commissioner has implied powers beyond the express provisions of the statutes substantially similar to those of a trustee of private property. *See Evans, I*, 14 Cal.2d at 572-73, 96 P.2d 107. The power to close an association surely is among the powers properly implied from the Commissioner's power to take possession of an association for the purpose of liquidation.

California Financial Code § 9010 also supports this result. It provides that the Commissioner may take "such other acts as are necessary or expedient to collect, conserve, or protect the association's business, property, and assets." *See also* Cal. Fin. Code § 5250. To conserve effectively a failing association's assets, the Commissioner must have the power to close an association when in her discretion it is necessary.[9]

Furthermore, where the FSLIC has been appointed state receiver by the Commissioner, as in this case, a reasonable interpretation of Financial Code § 9103 is that the FSLIC has the power to close a state-chartered savings and loan association. This is true because section 9103 provides that the FSLIC shall have all the powers and be subject to all the duties of the Commissioner, "and in addition shall have all the rights, privileges and powers conferred upon it by federal statutes now or hereafter enacted." California law thus incorporates all federal law concerning the powers of the FSLIC as receiver. Where the FSLIC

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[9]California law also recognizes the power of the California Superintendent of Banks to close banks, although there is no express statutory authorization for such power. *State Sav. & Commercial Bank v. Anderson*, 165 Cal. 436, 446, 132 P. 755 (1913), *aff'd mem.*, 238 U.S. 611, 35 S.Ct. 792, 59 L.Ed. 1488 (1915); Cal. Fin. Code § 3100. This authority is significant in light of the fundamental similarity between banks and savings and loans and their parallel supervision by the state. *North Am. Bldg. & Loan Ass'n v. Richardson*, 6 Cal.2d 90, 101, 56 P.2d 1221 (1936).

has been appointed for the purpose of liquidation, federal law authorizes it to "take such action as may be necessary to put [the association] in a sound and solvent condition, . . . or . . . to proceed to liquidate its assets in an orderly manner." 12 U.S.C. § 1729(b); *see also* 12 U.S.C. § 1729(d); 12 C.F.R. §§ 549.3, 569a.6 (1982).[10] The FSLIC's power to liquidate "in an orderly manner" necessarily includes the power to close a savings and loan, a power given by federal law and explicitly incorporated into California law by section 9103.

We also disagree with the district court's holding that closure on April 13, 1982, was precluded by Financial Code § 9003, which provides an automatic ten-day stay of liquidation following the taking possession of an association by the commissioner.[11] In *Evans II*, the California Supreme Court stated that the thirty-day stay period authorized by California Financial Code § 13.12, the predecessor to Financial Code § 9003, "is provided as an automatic stay of the exercise of the powers of liquidation by the Commissioner, *as distinguished from a stay of the process of liquidation*, in order to give the association an opportunity to obtain an injunction" (emphasis added). 20 Cal.2d at 189, 124 P.2d 820 (dictum). This distinction appears to be aimed at safeguarding the right to a review in the state court while at the same time recognizing the existence of those powers necessary to protect the assets from further deterioration and impairment pending such review. Thus, seizure of an association and the holding of its assets is a part of the *process* of liquidation. 20 Cal.2d at 189, 124 P.2d 820. *See also Trede*, 21 Cal.2d at 634, 134

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[10]Where the FSLIC is appointed state receiver under section 1729(c)(l), it has the same powers and duties conferred upon it when acting as a federal receiver for federally chartered savings and loans under 12 U.S.C. § 1729(b). 12 U.S.C. § 1729(c)(l).

[11]Section 9003 provides:

> Whenever the commissioner takes possession of an association's property, business, and assets pursuant to this article, the association may within 10 days after the taking of possession commence an action in the superior court of the county in which the principal office of the association is located, to enjoin further proceedings.

P.2d 745 (right of Commissioner to liquidate association is delayed pending the outcome of suit challenging Commissioner's actions); *State Savings & Commercial Bank v. Anderson,* 165 Cal. 437, 447-48 (1913), *aff'd mem.,* 238 U.S. 611, 35 S.Ct. 792, 59 L.Ed. 1488 (1915) (parallel provision of Bank Act allows superintendent to take temporary custody of bank pending action challenging superintendent's findings).

It is true, however, that *Evans II* did not address the question whether "closing" is to be regarded as part of the *power* of liquidation rather than the process of liquidation.
20 Cal.2d at 189, 124 P.2d 820. We believe the latter is the more apt characterization. Because "closing" sequentially must precede the definitive acts of liquidation and frequently will be necessary to preserve the assets, closing should be viewed as part of the *process* of liquidation under California law. So regarded, a closing is not subject to an automatic stay[12]. *Cf. Title Guaranty & Surety Co. v. Idaho,* 240 U.S. 186, 141 — 42, 86 S.Ct. 845, 846, 60 L.Ed. 2d 566 (1916) (distinguishing "closing" from "liquidation" for purposes of the Due Process Clause of the Fourteenth Amendment). An automatic ten-day stay of the Commissioner's power to close an association following its seizure could result in a run on the association that would impair or destroy the Commissioner's ability to protect association assets in the interest of creditors and claimants pending liquidation of an insolvent association. Cal. Fin. Code § 9010; *Trede,* 21 Cal.2d at 633-34, 134 P.2d 745.

This interpretation fully satisfies the requirements of procedural due process. *North American Building-Loan Ass'n v. Richardson,* 6 Cal.2d 90, 101, 56 P.2d 1221 (1936). The post-seizure review provided by section 9003 affords a constitutionally proper procedure. Allowing the Commissioner to close the association before ten days have passed not only is sensible but also constitutionally impeccable. Thus, the FSLIC acting as state receiver had the

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[12]We do not reach the question whether § 9003 requires an automatic 10-day stay of exercise of the *power* of liquidation.

power under California law to close Fidelity immediately upon taking possession.[13]

B. *Actual Closure*

The district court also held that the closure requirement of section 1829(c)(2)(A)(ii) was met only when an association "actually closed its doors to the public." A "CIA-like operation where the FHLBB orchestrates a neat five-minute 'closure' " was not sufficient. Excerpt of Record C.T. 101 at 18. Fidelity urges us to adopt the district court's approach, arguing that a closing under section 1729(c)(2)(A)(ii) requires a significiant disruption in the services of a state savings and loan association. The Bank Board and the FSLIC, on the other hand, assert that whenever the FLSIC is appointed as state receiver for the purpose of liquidation the closing requirement is satisfied. Neither the statute nor the legislative history offer definitive guidance. For the reasons that follow, we hold that when the Commissioner both appoints the FSLIC as state receiver and issues an order liquiding

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[13]In the alternative, state law may not be dispositive of compliance with § 1729(c)(2)(A)(ii). In *Tel. Sav. & Loan Ass'n v. FSLIC*, No. 80 C2792, slip op. at 13-14 (N.D. Ill., June 9, 1981), the district court concluded that the closing requirement of 12 U.S.C. § 1729(c)(2)(A) is net whenever an association is closed by the state regardless of the validity of that closing under state law. The legislative history of § 1729(c)(2) supports this reading of the statute. The Senate Report states:

> The effect of the legislation would be to enable the FSLIC to defend its appointment under Federal law instead of requiring it to defend the legality of the State savings and loan adminstrator's determinations under State law.

S. Rep. No. 1263, 90th Cong., 2d Sess. 11, *reprinted in* 1968 U.S. Code Cong. & Ad. News 2530, 2540. This statement evidences a congressional judgment that the effectiveness of a federal receivership depends on its being tested under uniform federal law. Given our interpretation of California law, however, we need not rely on this reading of the statute. We need not, however, rely on this reading of the statute based upon our interpretation of California law.

the state institution, the closing requirement of section 1729(c)(2)(A) is satisfied.

The enactment of section 1729(c)(2) by Congress was in response to the refusal of Illinois banking officials to cooperate with federal authorities after the collapse of the Marshall Savings and Loan Association in 1965. There state officials dealt with the association's financial difficulties by taking custody of the association and suspending all withdrawals for over three months. State custody was aimed at conserving shareholder assets rather than for the purpose of liquidation. FSLIC insurance payments could not be made until a receiver had been appointed for the purpose of liquidation, thus placing the association in default. 12 U.S.C. §§ 1724(d), 1728(b). Therefore, the FSLIC was powerless to provide insurance payments to depositors during the three-month period preceding the state's appointment of a receiver for liquidation, even though the depositors had been denied access to their savings. This inability to promptly reimburse depositors jeopardized public confidence in the savings and loan industry. S. Rep. No. 1263, 90th Cong., 2d Sess. 7, 8, 11, *reprinted in* 1968 U.S. Code Cong. & Ad. News 2530,. 2536, 2537, 2540 (hereinafter S. Rep.)

Because the State of Illinois did not appoint the FSLIC receiver for liquidation, the FSLIC was unable to manage the association's assets in such a way as to recoup the federal insurance fund payout. The state-appointed receiver denied the FSLIC access to the association's financial records, allowed the association's assets to deteriorate, and failed to reimburse the FSLIC for any portion of the insurance payments made to its depositors. The FSLIC ultimately lost $88 million in insurance payments and $12 million more in foregone interest. S. Rep. at 2536-37.

Section 1729(c)(2) was designed, generally speaking, to deal with this type of situation, in which at the time the state official has custody of the assets a state of hostility exists between the official and the FSLIC. More specifically, it was designed to heighten public confidence in the savings and loan industry by ensuring prompt insurance payouts to savers and to safeguard the financial integrity of the FSLIC by providing it with a means to

"federalize" a hostile state receivership.[14] Under section 1729(c)(2) "federalization" is possible even when the state receivership is not for the purpose of liquidation. S. Rep. at 2539-40. At the same time, Congress recognized a legitimate and competing state interest in regulating state-chartered associations. A balance was struck by dividing the responsibility for regulation of state savings and loan association between the states and the federal government. *See* S. Rp. at 2538. The requirements of a closure under state law and a determination of depositor inability to withdraw funds were meant to safeguard the state receivership from premature federal intervention.

Although the primary purpose of section 1729(c)(2) is reasonably clear, its language plainly applies beyond the narrow Marshall Savings and Loan context. The Marshall episode represented a "hostile" situation. The present case presents a different situation. The State Commissioner has acted to further Bank Board and FSLIC objectives by appointing the FSLIC state receiver. Thus, the relationship between the State of California and the FSLIC may appropriately be described as nonhostile. The withdrawal by the Commissioner of her appointment of the FSLIC on July 27, 1982 does not alter this characterization.[15]

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[14]Senator Bennett stated:

> The bill has two purposes. The first . . . authorizes the Federal Savings and Loan Insurance Corporation to make *immediate payment to savers* having shares in a savings and loan institution *closed by State authorities* . . . The second purpose of the bill is to provide for the appointment of the Federal Savings and Loan Insurance Corporation as a receiver *in any instance where it is required to use insurance funds* of the Corporation to meet its liability to the State institution's savers.

114 Cong. Rec. 11.725 (1968) (emphasis added).

[15]In her Order terminating the appointment of FSLIC as state receiver, the validity of which is not before us, the Commissioner recited the circumstances which in her view made the removal of the FSLIC appropriate. These included the fact that as federal receiver the FSLIC had sold and transferred substantially all of the assets and liabilities of Fidelity to a new federal mutual savings and loan association (Fidelity

In the nonhostile situation the state's interest is served by advancing the federal interest. No fundamental difference in objectives exists between the two. State officials have invited federal intervention by choosing to appoint the FSLIC state receiver and ordering the association's liquidation. No need to protect the state from unwanted federal meddling exists. Compliance with the preconditions of closure and withdrawal inability inescapably becomes substantially a ceremonial formality.

The district court would require an actual physical closure of the doors of the association for at least more than five minutes. Perhaps closure for one-half day would suffice. To require a closure of that duration under the circumstances of this case is to insist upon an empty ceremony. The formalities that attended the issuance by the Commissioner of her liquidation order and the appointment of the FSLIC as state receiver amply validated the utility of federal intervention. To require additional validation consisting of a ceremonial closure and denial of withdrawal by at least one depositor whose appearance is prearranged by the Commissioner and the Board is to require enactment of a farce. To the extent closure and denial of withdrawal are required not to be by prearrangement, the rule imposes upon the relevant financial community an unnecessary risk of depositor panic.

Section 1729(c)(2) shuld not be interpreted to require either the incurring of this risk or the performance of empty ceremonies. Therefore, we hold that the issuance of a liquidation order and the appointment of the FSLIC as a state receiver of Fidelity by the Commissioner achieved a closure within the meaning of section 1729(c)(2)(A). The State of California, appearing as amicus

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Federal), and that consequently no depositor's funds were now at risk. Order of Linda Tsao Yang, Savings and Loan Commissioner of the State of California, Removing State Receiver and Extinguishing State Receivership (July 27, 1982), attached to Letter from Thomas P. Vartanian, General Counsel, Federal Home Loan Bank Board, to Philip B. Winberry, Clerk, United States Court of Appeals for the Ninth Circuit (Aug. 9, 1982) (filed Aug. 10, 1982). We infer from the wording of the Commissioner's order that the goal of safeguarding depositor funds was a motivating factor in her original decision to cooperate with the Bank Board by appointing FSLIC state receiver.

curiae, acknowledges that had the Commissioner's liquidation order specifically included a provision closing Fidelity, any basis for insisting that the closure requirement was not met would be removed. However, inasmuch as the language of the Commissioner's order tracked the language of the California statute which, as already demonstrated, empowers closure, its omission from the order is not significant.

We recognize that we are interpreting section 1729(c)(2) teleologically, not literally. That is, our interpretation is guided by a desire to fit the section to nonhostile situations in which the Bank Board and the state authority concur in the need to accomplish quickly and smoothly the imposition of a federal receivership of a state savings and loan association. To frustrate this joint desire by insistence upon ceremonies that are meaningless, at best, and financially dangerous, at worst, strikes us as unwise.

We reach this conclusion although insistence upon these ceremonies would serve to enhance the analytic meshing of subsection 1729(c)(1) and (c)(2). Under our interpretation, appointment of the FSLIC as receiver by the appropriate state authority upon "default" of a state savings and loan association can be converted from a receivership under state law to one under federal law quite easily. The section 1729(c)(1) requirement of "default" can be counted upon to supply the section 1729(c)(2) elements of closure and inability to withdraw in most instances. It can be argued that only by insistence upon ceremonial closure and denial of withdrawal, at the very least, can the intent of Congress expressed in enacting section 1729(c)(2) be harmonized with, and made sufficiently independent of, section 1729(c)(1). An even broader argument would be that section 1729(c)(2) is only available in the "hostile" situation such as existed with respect to the Marshall Savings and Loan Association. We reject these arguments. To us promulgation of a liquidation order by proper state authority under state law that authorizes immediate closure joined with appointment of the FSLIC as state receiver permits federalization of the receivership by the Board, if it should choose to do so, provided the preconditions of section 1729(c)(2)(B) also exist. The language of the statute permits our interpretation

and it does no disservice to the interests of depositors for whose protection the FSLIC exists.

Our interpretation also does no harm to the states. The appropriate state authority need not promulgate the liquidation order nor appoint the FSLIC as receiver. The fact that the Board may urge strongly that the state authority issue these orders alters nothing. It is within the state's power to refuse and to force into existence the literal fulfillment of the closure and inability to withdraw preconditions to federal intervention. That this might be a very imprudent thing for the state to do merely strengthens the case for the interpretation we give the statute.

Nor does our interpretation impose upon the shareholders of a state savings and loan association a deprivation of due process. The precondition set forth in section 1729(c)(2)(B), which requires that proper grounds for the intervention exist, assures stockholders that federal intervention was proper. Under the circumstances of the case and in light of the importance to society of preserving faith in our financial institutions, we hold, in a manner similar to our analysis of California law, that a post-intervention hearing with respect to the propriety of the grounds for federal intervention amply satisfies the shareholders' right to procedural due process, *Fahey v. Mallonee*, 322 U.S. 245, 253-54, 67 S.Ct. 1552, 1554-56, 91 L.Ed. 2030 (1947) (appointment of conservator for savings and loan by Bank Board under Home Owners' Loan Act); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 299-300, 101 S.Ct. 2352, 2372, 69 L.Ed.2d 1 (1981) (citing *Fahey*); *Parratt v. Taylor*, 451 U.S. 527, 538-39, 101 S.Ct. 1908, 1914-15, 68 L.Ed.2d 420 (1981) (same).

IV.

DEPOSITOR INABILITY TO WITHDRAW

Our approach to the requirement of closure foreshadows our view of the district court's holding that because the Bank Board could not identify any depositor who was unable to withdraw funds from his account, the withdrawal requirement of section

1729(c)(2)(C) was not satisfied. We reject this holding. Section 1729(c)(2)(C) does not require that an account holder *actually be denied* a withdrawal; it only requires that the Bank Board determine that an account holder is "*unable*" to make such a withdrawal. The Bank Board properly so determined in this case. The required inability follows logically from the conclusion that Fidelity was closed.

Logic alone, however, need not carry the full burden of this conclusion. We have already indicated that under the circumstances of this case a ceremonial denial of withdrawal by one or more accountholders would serve no useful purpose. Thus, proceeding as we did in our treatment of the closure requirement, we hold that when the Commissioner promulgated her liquidation order and her appointment of the FSLIC as state receiver, and the Board accepted the appointment, the requirement of inability to withdraw was met. We believe that Congress did not intend to require a ritualistic and potentially harmful disruption of business as a prerequisite to a federal receivership where the state has, by appointing FSLIC receiver, manifested its desire to yield control to and cooperate with the Bank Board. Here, as in connection with the closure precondition, we reject possible more narrow interpretations of section 1729(c)(2). We therefore find that the withdrawal requirement was satisfied in this case.

C.

DISPOSITION

In light of our holdings in this case, we need not consider Fidelity's cross-appeal from the district court's refusal to require appellants to extend the same loans and guarantees to Fidelity that were made available to its successor. Fidelity Federal. The judgment of the district court, 540 F.Supp. 1374, is reversed. We remand to the district court for further proceedings consistent with this opinion and specifically to allow consideration of the question whether any one of the conditions required by 12 U.S.C. § 1729(c)(2)(B) existed prior to the Bank Board's appointment of the FSLIC receiver.

REVERSED and REMANDED.

APPENDIX C

FIDELITY SAVINGS AND LOAN ASSOCIATION,
Plaintiff,

v.

FEDERAL HOME LOAN BANK BOARD,

et al.,

Defendants.

No. C-82-1592 SW.

United States District Court,

N.D. California.

May 24, 1982.

On Removal of Receiver June 8, 1982.

On Remedies June 4, 1982.

MEMORANDUM AND ORDERS

SPENCER WILLIAMS, District Judge.

Plaintiff Fidelity Savings and Loan Association (Fidelity) brings this action to remove the Federal Savings & Loan Insurance Corporation (FSLIC) as receiver of its assets and for such other equitable relief as it deems is necessary and permissible under the statute to place it in the same position it occupied on the date of the appointment. Defendants Federal Home Loan Bank Board (FHLBB) and FSLIC filed a motion for summary judgment on the ground that there are no material issues of fact concerning the satisfaction of the statutory prerequisites for appointment of a receiver. After careful consideration of the excellent and exceedingly thorough briefs of all parties, the court concludes that the motion must be denied at this time. The following constitutes a brief explanation of the court's reasoning.

APPLICABLE LEGAL STANDARDS

The jurisdiction of this court is predicated on Title 12 U.S.C. § 1464(d)(6)(A) which provides that the FHLBB may appoint a receiver for a savings and loan association *ex parte* and without notice when it feels, in its opinion, that an adequate ground for such appointment exists under the law. The statute specifically outlines the association's remedy:

> In the event of such appointment [of a receiver], the association may, within thirty days thereafter, bring an action in the United States district court for the judicial district in which the home office of such association is located, or in the United States District Court for the District of Columbia, for an order requiring the Board [FHLBB] to remove such conservator or receiver, and the court shall upon the merits dismiss such action or direct the Board to remove such conservator or receiver.

The statute further spells out that an action under the above-quoted statute is the sole and exclusive method by which an association may affect removal of the receiver. 12 U.S.C. § 1464(d)(6)(C).

When assessing the propriety of the FHLBB's exercise of power to appoint a receiver, the court must examine the statutory requirements for such an appointment. Title 12 U.S.C. § 1729(c)(2) states that the FHLBB shall have exclusive power and jurisdiction to appoint the FSLIC as the receiver of an insured state savings and loan association if it determines:

> (A) that . . . (ii) an insured institution (other than a Federal savings and loan association) has been closed by or under the laws of any State;
>
> (B) that one or more the grounds specified in paragraph (6)(A) of section 1464(d) of this title, existed with respect to such institution at the time a conservator, receiver, or other legal custodian was appointed, or at the time such institution was closed, . . .; and

(C) that one or more the holders of withdrawable accounts in such institution is unable to obtain a withdrawal of his account, in whole or in part;

Section 1464(d)(6)(A), referred to in subsection (B) of section 1729(c)(2) permits the appointment of a receiver whenever the association is in "an unsafe or unsound condition to transact business."

STANDARD OF REVIEW

The parties to this action dispute the standard by which the court is to review a determination by the FHLBB that the three requirements of section 1729(c)(2) have been met. Fidelity, on the one hand, seeks a trial *de novo* on both the existence of facts supporting a 1729(c)(2) determination *and* the exercise of that jurisdictional power by the FHLBB. On the other hand, FSLIC and the FHLBB argue that the court's power of review is limited to a *post facto* adversarial hearing on whether the statutory grounds were present.

A reasoned analysis of this question begins and ends with an inquiry into the meaning of the term "on the merits" contained in the grant of jurisdiction contained in section 1464(d)(6)(A). Initially, the court concludes, as did Judge Grady in *Telegraph Savings & Loan Ass'n v. Federal Savings & Loan Insurance Corp.*, No. 80 C 2792 (N.D. Ill., filed June 9, 1981), that this phrase necessarily implies that the court's power to review the FHLBB's determination is not bound by the normal limitations applicable to an administrative review of an agency's previous adjudication. *See* 5 U.S.C. § 706(2)(E). If it means nothing more, the term "on the merits" reveals that a proceeding under this statute is more in the nature of a *de novo* review than an appellate review. *Cf. Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348, 354-55, 81 S.Ct, 1570, 1573-74, 6 L.Ed.2d 890 (1961).

Clearly, the ordinary reasons calling for deference to an administrative decision are not present in the instant situation. There were no adversarial hearings before the agency and there was no identifiable administrative record. *See generally Washington Federal Savings & Loan Ass'n v. Federal Home Loan Bank Board,*

526 F.Supp. 343 (N.D.Ohio 1981). Moreover, the statute giving rise to the agency's jurisdiction in no way contemplates any limitations on this court's powers of review. The statute calls for an expedited hearing on the merits of the Board's decision and allows the court to reverse completely the appointment decision as opposed to remanding the case for further consideration.

Accordingly, the court concludes that, in light of the serious due process considerations, the plaintiff is entitled to a full adversarial hearing on the question whether the three prerequisites listed in section 1729(c)(2) were present in this action. As to this question, the court sits not as an appellate body but as independent reviewer of the evidence. Therefore, Fidelity must be accorded the opportunity to present evidence and cross examine witnesses on the question of whether the FHLBB's conduct met the statutory requirements. Because the agency's decision is entitled to a minimal presumption of correctness, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 414, 91 S.Ct. 814, 822, 28 L.Ed.2d 186 (1970), the plaintiff bears the burden to show the agency's decision was incorrect by the weight of the evidence.

However, the court's power to reexamine the Board's decision is not unlimited. On the contrary, the normal rule that fundamental policy questions should be resolved by the legislative and executive branches and not by the courts applies with equal force to the present situation. *See, e.g., Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558, 98 S.Ct. 1197, 1219, 55 L.Ed.2d 460 (1977). This court is not to substitute itself for the Federal Home Loan Bank Board in the decision to exercise its jurisdiction, if it is present. Rather, once the court determines that the three statutory prerequisites have been satisified, it will not disturb the decision of the Board to exercise its jurisdiction unless there has been an abuse of discretion in the exercise of that power.

Therefore the issues before this court are (1) whether, when looking at all the evidence that was available to the Board and that information subsequently discovered, the three statutory prerequisites were satisfied; and (2) whether the Board's exercise of jurisdiction constituted an abuse of discretion.

MOTION FOR SUMMARY JUDGMENT

The defendants have moved for summary judgment on the ground that all the facts demonstrate that the decision to appoint a receiver was premised on a supportable factual base. After careful consideration of all the briefs and arguments of counsel and all the evidence presently in the record, the court concludes that the motion must be denied at this time. Questions of fact remain as to Fidelity's financial condition at the time the receiver was appointed. Moreover, the questions of closure and unwithdrawable accounts require a further factual understanding before the questions can be resolved as a matter of law. Like many "fact-law" decisions (e.g. personal jurisdiction), the questions on closing and withdrawals can be resolved once all facts are properly presented to the court.

Accordingly, the court will bifurcate the trial and try the questions of closure and unwithdrawable accounts before the court reaches the issue of "unsafe and unsound condition." After all facts as to the closure and unwithdrawable accounts are presented, the court will determine these questions as a matter of law.

CONCLUSION

IT IS HEREBY ORDERED that the defendants' motion for summary judgment be, and hereby is, denied without prejudice to being renewed at the conclusion of the first part of the bifurcated trial.

IT IS FURTHER ORDERED that the defendants' motion in limine is denied.

IT IS FURTHER ORDERED THAT the trial of this action be bifurcated trying the issues of closure, nonwithdrawable accounts and "unsafe and unsound condition" *seriatam*.

IT IS SO ORDERED.

ON REMOVAL OF RECEIVER

INTRODUCTION

This action raises extremely important questions concerning the timing of federal intervention in the seizure of a state savings and loan association and the degree to which the Federal Home Loan Bank Board (FHLBB) may manipulate the nature of a takeover so as to satisfy strict statutory prerequisites to such action. Resolution of these questions requires that the court examine the manner in which Congress balanced the need for prompt federal response to failing financial institutions against the need to protect such institutions from arbitrary or precipitous federal takeovers in violation of such institutions' due process rights.

[4] After careful consideration of all the relevant facts and a thorough reading of the applicable legislative history, the court concludes that the FHLBB acted precipitously and overzealously in appointing a federal receiver for the plaintiff Fidelity Savings and Loan Association. No matter how well-intentioned or motivated by apparent economic necessity its actions, the FHLBB acted in violation of both the clear command of the applicable federal statute and the underlying policy which limited federal intrusion in the supervision of state associations. Accordingly, the court rules that the defendants failed to satisfy the statutory requirements and the receiver must be removed.

FACTUAL BACKGROUND

The genesis of this action goes back to 1979 when the plaintiff Fidelity Savings and Loan Association (Fidelity) gambled that interest rates would fall and began selling large amounts of short-term paper to make long-term mortgage loans. Unfortunately for Fidelity, the gamble proved unwise as interest rates rose sharply and it was forced to roll over its short term borrowing. As a result, Fidelity experienced severe financial difficulties due to the increasing spread between the high cost of money and the interest that it earned on its low-yielding mortgage portfolio.

Consequently, Fidelity began suffering large operating losses and experienced a substantial loss in net worth. In an attempt to cope with its financial problems, Fidelity borrowed some $1.3 billion from the Home Loan Bank of San Francisco (the Bank) between October, 1979 and March, 1982. The Bank predicated its loans to Fidelity on placing the association in a "special credit category" by which it was charged interest rate penalties and higher interest than other borrowing associations.

In late 1981 and early 1982, while Fidelity was pursuing administrative relief from the special credit program, the Bank's President, Milton Feinerman and other members of the Bank staff began making suggestions to the State Savings and Loan Commissioner, Linda Tsao Yang, that she should take possession of Fidelity due to its liquidity crisis. In addition, Richard Pratt, Chairman of the Bank Board, and H. Brent Beesley, Director of defendant Federal Savings and Loan Insurance Corporation (FSLIC), made requests early in 1982 that the Commissioner take possession of Fidelity. Each time, the Commissioner refused and recommended that other alternatives be explored.

On April 5, 1982, Fidelity was notified in writing that the Bank would not grant it any relief from the special credit program. Thereafter, on April 9, 1982, Fidelity filed a lawsuit against the Bank in this Court, No. C 82-1389 EFL, seeking recovery of the penalties and excess interest charges which totalled some $62.4 million. On that same day, the Bank's Executive Committee convened by telephone conference and, based in part on the massive "panic" withdrawals from Fidelity during the week of April 5, 1982, authorized Mr. Feinerman to advise the FSLIC that the Bank would not advance any additional funds to Fidelity unless FSLIC would guarantee such loans.

After FSLIC was notified of the Bank's decision, Mr. Feinerman and Mr. Beesley placed a conference call to Commissioner Yang to inform her that FSLIC would not guarantee any additional advances unless she acted to take possession of Fidelity and appoint FSLIC as receiver. Commissioner Yang engaged the federal officials in an hour long conversation in which she resisted State seizure and indicated that due to Fidelity's still present net worth she advocated an unconditional merger resolution. How-

ever, after further discussion, Mr. Beesley indicated that FSLIC was not concerned with protecting the shareholders' interests and that Fidelity's financial condition was so poor that a state receivership was the only acceptable solution. Faced with the situation where Fidelity would not receive any more money advances, the Commissioner testified that she had "no choice but to do what the Federal regulators wanted the State to do; to take possession of the institution and to appoint FSLIC the receiver." (Yang Deposition, p. 31, 11.19-22.)

The State Commissioner and the federal officials agreed that the State would take possession of the association at the close of business on Tuesday, April 13, 1982 and turn it over to FSLIC as state receiver. Commissioner Yang testified that she wanted to insure a smooth transition in such a manner that the depositors and the public were completely unaffected by the appointment of the state receiver. (Yang Deposition, p. 34, 11.6-14; p. 157, 11.16-23; p. 164, 11.22-27.) The Commissioner did not contemplate that the doors to the association would be closed and she stated that the language contained in the State's Order Demanding and Taking Possession was intended merely to facilitate the matching of the technical legal language between state and federal law. (Yang Deposition, p. 169, 11.6-13; p. 171, 11.3-5.)

The only step remaining in the well-orchestrated federal takeover of the state savings and loan association was the physical seizure of the association. Over the weekend, the federal regulators dispatched hundreds of federal bank examiners from all over the country to California to serve in their appointed outposts in individual branches. On Tuesday, April 13, 1982, a handful of federal and state officials entered the Fidelity offices in Oakland, California at precisely 4:40 p.m., twenty minutes before closing. With watches synchronized, the officials entered Fidelity's executive offices and served the papers "closing" the association at 4:47 p.m. According to the testimony of Mr. Ronald Taylor, an attorney for the FHLBB who was part of the operation in Oakland, different members of the takeover team fanned out to tell other employees in the building of the association's seizure. Mr. Taylor also testified that there was some question as to whether the regulators should bar all doors but such was not done

because some Fidelity employees needed to go home. There is a dispute in the record as to whether all doors in all Fidelity offices actually were closed; however there is no dispute that the entire operation took less than thirty minutes.

Immediately thereafter, the State took possession of the business property and assets of Fidelity, Mr. Durkin, the Chief Deputy Savings and Loan Commissioner for the State of California, tendered the appointment as State receiver to FSLIC. Within a few moments later FSLIC terminated the State receivership by declaring itself to be the sole federal receiver based upon a series of resolutions that had been approved by the FHLBB the preceding day. At the same time, most of Fidelity's assets were transferred to a newly-created federal mutual association, Fidelity Federal Savings and Loan Association of San Francisco. This same mutual association has carried on the business from April 13, 1982 forward.

Shortly after the takeover, the plaintiffs brought this action pursuant to 12 U.S.C. § 1464(d)(6)(A) to remove FSLIC as receiver of its assets and for such other equitable relief as it deems is necessary and permissible under the statute to place it in the same position it occupied on the date of the appointment.

Pursuant to the mandate of the statute, this court established an expedited schedule for the trial of this action. After extensive discovery and the filing of numerous briefs on the legal and factual questions presented, the court on its own motion ordered that the issues of "closing" and "unwithdrawable accounts" be bifurcated and tried on the record before the court. *See* Fed.R.Civ.P.43(b); *Richmond v. Weiner*, 353 F.2d 41, 44 (9th Cir. 1965), *cert. denied*, 384 U.S. 928, 86 S.Ct. 1447, 16 L.Ed 2d 531 (1966).

LEGAL STANDARDS

The jurisdiction of this court is based on title 12 U.S.C. § 1464(d)(6)(A) which provides that the FHLBB may appoint a receiver for a savings and loan association *ex parte* and without notice when it feels, in its opinion, that an adequate ground for such appointment exists under the law. The statute provides:

> In the event of such appointment [of a receiver], the association may, within thirty days thereafter, bring an action in the United States district court for the judicial district in which the home office of such association is located, or in the United States District Court for the District of Columbia, for an order requiring the Board [FHLBB] to remove such conservator or receiver, and the court shall upon the merits dismiss such action or direct the Board to remove such conservator or receiver.

When assessing the propriety of the FHLBB's exercise of power to appoint a receiver, the court must examine whether the FHLBB met all the statutory prerequisites to such an appointment. Title 12 U.S.C. § 1729(c)(2) lists the three separate requirements that must be satisfied:

> (A) that — (ii) an insured institution (other than a Federal savings and loan association) has been closed by or under the laws of any State;
>
> (B)that one or more of the grounds specified in paragraph (6)(A) of section 1464(d) of this title, existed with respect to such institution at the time a conservator, receiver, or other legal custodian was appointed, or at the time such institution was closed, . . .; and
>
> (C) that one or more of the holders of withdrawable accounts in such institution is unable to obtain a withdrawal of his account, in whole or in part;

In this part of the bifurcated trial, the court is concerned with independent requirements contained in subdivisions (A) and (C) above.

In determining whether the association was closed under the laws of the State of California,[1] the court must turn to the authority granted the Savings and Loan Commissioner under

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[1] All parties agree that the first alternative statutory precondition for creation of a federal receiver, i.e., the existence of a state receiver for 15 days, 12 U.S.C. § 1729(c)(2)(A)(l), was not met because the FHLBB appointed FSLIC the same day.

California law.[2] Section 9001 of the California Financial Code provides that the Commissioner may demand and take possession of the property, business and assets of an association if he or she determines that certain statutory conditions are present.[3]

Once the Commissioner takes possession of an association, he or she "may retain possession . . . until the association resumes business with the consent of and subject to the conditions imposed by the commissioner, or until its affairs are liquidated." Cal.Fin. Code § 9002. While the Commissioner may perform such other acts as are necessary to protect the association (Cal.Fin.Code § 9010), he or she must, unless he or she has been

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[2]Since FSLIC originally accepted appointment as a state receiver, Cal.Fin.Code § 9103 subjects it to all the duties of the Commissioner, including any limitations applicable to the power to close the association.

[3]Cal.Fin.Code § 9001 provides:

> The commissioner may demand and take possession of the property, business and assets of an association if any of the following occur:
>
> (a) The association does not comply with the order given pursuant to Section 9000, within the time specified therein.
>
> (b) It appears to the commissioner that the association is in an unsafe condition or is conducting its business in an unsafe or injurious manner such as to render its further proceeding hazardous to the public or to any or all of its investors.
>
> (c) The commissioner finds that the association's assets are impaired to such an extent that, after deducting all liabilities other than to its investors they do not equal or exceed the sum of the value of its outstanding shares and investment certificates and the amount set aside as a fixed and permanent capital of the association pursuant to Section 6456 of the Financial Code.
>
> (d) The association refuses to submit its books, papers, and accounts to the inspection of the commissioner or any of his examiners, deputies, or assistants.
>
> (e) Any officer of the association refuses to be examined upon oath concerning the affairs of the association.

enjoined or has previously returned the association for the resumption of business, proceed to liquidation. Cal.Fin.Code § 9011.

Finally, the powers of the Commissioner are subject to immediate judicial review. Section 9003 of the Financial Code provides:

> Whenever the commissioner takes possession of an association's property, business, and assets pursuant to this article, the association may within 10 days after the taking of possession commence an action in the superior court of the county in which the principal office of the association is located, to enjoin further proceedings.

It is settled that the ten day period is provided as an automatic stay of the exercise of the powers of the Commissioner to liquidate the association. *Evans v. Superior Court,* 20 Cal.2d 186, 124 P.2d 820 (1942). Accordingly, the Commissioner is prohibited from undertaking any actions during the ten day period that would compromise the association's statutory right to challenge the seizure under state law. *Id.*

DISCUSSION

A. *Closing Under State Law*

The first statutory precondition for creation of a federal receivership in this case is that the association be closed under state law, 12 U.S.C. § 1729(c)(2). An examination of the relevant California statutes and common sense both compel the conclusion that as a state receiver of Fidelity, FSLIC's actions in "closing" the association for a matter of minutes is insufficient.

As a state receiver, FSLIC stood in the same shoes with the same statutory powers as the Commissioner. Cal.Fin.Code § 9103. California law grants the Commissioner the power to take and retain possession, to operate the business, to oversee a reorganization, to return the business to the association or to liquidate. Cal.Fin.Code §§ 9001, 9002, 9011. *Pacific States Savings & Loan Co. v. Hise,* 25 Cal.2d 822, 155 P.2d 809 (1945). However, nowhere do the statutes give the Commissioner the

power to close an association and such power does not exist unless it is following a decision to shut down the business and liquidate.

The defendants argue that these California statutes impliedly provide the power to close an association. First, defendants contend that the clause in section 9002 that permits the commissioner to retain possession "until the association resumes business" necessarily implies the preexisting power to close. Such an inference does not follow logically from the language and context of the statute. These provisions in the Financial Code concern the power of the Commissioner to take possession and have his or her office run the business until liquidation. As an alternative, the Commissioner may continue the business until such time that he decides to return it to the association for its *resumed* management. Clearly, to imply the virtually unreviewable and irreversible decision to close would violate the California legislature's sensitivity to the due process rights of the association. *See* Cal.Fin.Code § 9003; *Evans v. Superior Court,* 20 Cal.2d 186, 124 P.2d 820 (1942).

Second, the defendants submit that the Commissioner acquires the power to close a seized association under Cal.Fin.Code § 9010 which permits "such other acts as are necessary or expedient to collect, conserve, or protect the association's business, property, and assets." To the extent the power to close is an implied power under section 9010, such authority cannot be exercised for ten days after the Commissioner first takes possession in order for the association to seek judicial review under section 9003. The California legislative scheme, like its federal counterpart embodied in 12 U.S.C. § 1729(c)(2), evidences a particular sensitivity to the due process rights of associations subject to *ex parte* governmental takeovers. Accordingly, the California statute allows for an automatic ten day stay of any commission action pending judicial review. Cal.Fin.Code § 9008; *Evans v. Superior Court, supra.* Therefore any power to close implied under section 9010 could not be exercised if to do so would deprive the association of its statutory right to state court review. [4] Since in

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[4]To the extent the Commissioner desires judicial review before the expiration of the ten day period of acts not expressly authorized by this

the instant case, there could have been no valid closure for ten days after the appointment of the state receiver, the first requirement of section 1729(c)(2) was not met.

In summary, therefore, the Commissioner lacked the statutory authority to close Fidelity under either the express or implied provisions of the California Financial Code. In fact, the Commissioner's office has acknowledged that she lacked the authority to close a state savings and loan association. (Durkin Deposition, pp. 43-44). Finally, even if the Commissioner did somehow acquire an implied power to close, the evidence demonstrates that in this case Commissioner Yang did not intend to affect a closure and was assured that the FSLIC receivership would not result in any operation of the association's daily business.

B. *Closing Under Federal Law*

The defendants basic argument under section 1729(c)(2)(A)(ii) is that any time FSLIC is appointed a state receiver it can simply declare an association "closed" (or enact the drama of closing all doors for one or two minutes) and have the FHLBB appoint it as a federal receiver. Such a reading would emasculate the independent and well-thought out prerequisites to federal intervention in the affairs of state savings and loan associations.

Section 1729(c)(2) was adopted as part of the Bank Protection Act of 1968, Pub.L.90-389, 82 Stat. 294 (the Act). Before the passage of the Act, no federal regulatory body had the power to place a state-chartered savings and loan association in federal receivership. Under the old law, the FSLIC was only authorized to accept an appointment as receiver when the state association was in default and the receiver had been appointed for the purpose of liquidation. *See* 12 U.S.C. § 1724(d).

In 1968, Congress concluded that, in order to enable FSLIC to make prompt payments of insurance to depositors and to ensure an orderly disposition of assets, the Bank Board needed the authority to make FSLIC a federal receiver for state-chartered

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part, he or she may seek such confirmation pursuant to Cal.Fin.Code § 9012(a).

associations in certain circumstances. *See* 114 *Cong.Rec.* 18298 (1968). Congress was concerned with a limited type of problem that had arisen in the case of Marshall Savings & Loan Association where the association was placed in custody but not for the purpose of liquidation. Although the state authorities had the authority, they did not appoint FSLIC as a state receiver. As such, under then existing law, FSLIC was powerless to provide insurance for saving account holders for several months despite the fact that the institution was closed and it had suspended all withdrawals. it was only several months later when a receiver for the purpose of liquidation was appointed, that FSLIC payments were triggered. *See* 114 *Cong.Rec.* 18299.

The *Marshall* case posed several real problems for the federal regulators. First, the lengthy passage of time undermined public confidence in the safety and stability of state associations. Second, FSLIC was unable to monitor the state institution and preserve at the earliest possible stage the greatest percentage of assets. Finally, the account holders themselves were greatly prejudiced. 114 *Cong.Rec.* 17725.

In light of the possibility of state institutions avoiding FSLIC intervention even when they had been closed for substantial periods of time and when the institution was actually denying withdrawals, Congress enacted the 1968 legislation. In doing so, however, Congress recognized *two* competing interests: 1) FSLIC protecting its own funds and taking over as early as reasonable; and 2) Protecting the right of the states to regulate savings and loan associations without federal intervention until the most severe or urgent situation occurs such as near certain collapse. 114 *Cong.Rec.* 17726.

As originally introduced, S.3436 would have authorized the Bank Board to appoint FSLIC as federal receiver for an insured state association if (1) a conservator, receiver or other legal custodian has been appointed or the association has been closed under state law; and (2) the appointment is "advisable in the public interest." *Id.* The committee criticized the bill as to broad and affording state associations few legal challenges against the appointment of a federal receiver. *Id.*

In order to meet the objections, Congress established three *very objective standards* that must each be met before the federal regulators could take over a state institution. Congress expressly limited federal intervention to those urgent situations, as presented by the *Marshall* case, where the federal regulators had not independent means of protection and were forced to stand by and helplessly watch a state association close its own doors or be closed by an *independent* act of the state government.

In the present case, the federal regulators have placed the cart before the horse. Instead of waiting for the state to close the state association, the FHLBB played an active role in the artificial creation of a closing under state law. Moreover, the Board failed to wait the required fifteen days to appoint FSLIC as a federal receiver notwithstanding that the State already had appointed FSLIC as a receiver under state law.

When Congress required a closure, it envisioned a situation where the association actually closed its doors to the public. Congress certainly did not envision a CIA-like operation where the FHLBB orchestrates a neat five-minute "closure" to affect a paper satisfaction of the statutory requirements with the state acting as an unwilling coconspirator. Comity and due process require more.

C. *Failure to Make a Withdrawal*

In addition to requiring that the association be closed under state law, section 1729(c)(2) requires that "one or more of the holders of withdrawable accounts . . . is unable to obtain a withdrawal of his account in whole or in part." The defendants concede that they cannot identify any person who was unable to withdraw funds from a withdrawable account. However, they argue that once an association is closed under state law, depositors *ipso facto* cannot withdraw their funds. Such a statutory construction, while expedient to the facts of this case, would in essence write out the requirement from the statute. This court cannot abide such an interpretation.

It is well established that "a statute should not be construed in such a way as to render certain provisions superfluous or insignifi-

cant." *Woodfork v. Marine Cooks & Stewards Union*, 642 F.2d 966, 970-71 (5th cir. 1981); *General Motors Acceptance Corporation v. Whisnant*, 387, F.2d 774, 777-78 (5th Cir. 1968). This rule applies with special force to the present situation where the allegedly cumulative term was added by Congress by amendment to a bill that already contained the first requirement. 114 *Cong.Rec.* 17726.

In the present case, one need not conclude that this third requirement has no independent significance or, as defendants would hypothesize, only comes into play when the state custody lasts for a lengthy period of time. On the contrary, the requirement that a holder of a withdrawable account be denied a withdrawal is meant to narrow further the occasions when federal intervention is state takeovers will be permitted. It is at least possible that an association could be closed under state law and yet generate no run on the accounts. For whatever reason this might occur, the absence of any depositors being denied a requested withdrawal would be a situation where federal restraint would be in order.

In their final brief filed on these questions, the defendants attempt one final time to escape the straight-forward closure and nonwithdrawable accounts requirements. In short, the defendants argue that section 1729(c)(2)(A) and (C) do not apply where FSLIC has already been appointed state receiver. The short and simple answer to the defendants' inventive argument is that it fails to come to grips with the clear and unambiguous language of the statute. If the exercise of FSLIC authority as a state receiver under section 1729(c)(1)is sufficient to transform FSLIC immediately into a federal receiver then section 1729(c)(2) becomes mere surplusage and without meaning in a vast number of receivership cases. Such statutory construction is fundamentally unsound. *See, e.g., United States v. Wilson*, 591 F.2d 546, 547 (9th Cir. 1979).

CONCLUSION

It is, of course, well-established at this point in our decisional law that the drastic public and private consequences of a failing financial institution permits prompt and decisive *ex parte* regula-

tory action. *See, e.g., Fahey v. Mallonee,* 332 U.S. 245, 253-54, 67 S.Ct. 1552, 1555-56, 91 L.Ed. 2080 (1947). However, due to the serious consequences of such action, this regulatory authority must be exercised with great caution and restraint.

The court has no doubt that the defendants here were, as they saw it, acting in the best interests of the taxpayers, the depositors and the Industry. In effect, however, they were precipitous in their exercise of authority and failed to await the occurrence of the statutory preconditions in their natural time.

"The aim of the [1968] legislation is to enable the FSLIC to effect an orderly disposition of the assets of insured associations whose depositors have been reimbursed by FSLIC insurance payments." S.Rep.No. 1268, 90th Cong., 2d Sess. (1968), U.S. Code Cong. & Admin. News 1968, p. 2580. In this case, FSLIC had paid no funds to any Fidelity depositor. If the natural reaction to the relevant statutes is that FSLIC response will always be "too little, too late," the most appropriate focus of such comment is the Congress. As it presently reads, section 1729(c)(2) presents three clear and unambiguous prerequisites to federal intervention in this area.

Accordingly,

IT IS HEREBY ORDERED that the Federal Home Loan Bank Board shall remove the federal receiver forthwith.

The court will entertain further arguments and briefing as to the specifics of such additional relief as may be available to the parties hereto.

IT IS SO ORDERED.

ON REMEDIES

This action is presently before the court on the question of remedies available to a state savings and loan association whose assets were wrongfully seized by the Federal Home Loan Bank Board (FHLBB). This court has previously determined that the FHLBB's appointment of the Federal Savings and Loan Insurance Corporation (FSLIC) as federal receiver for the plaintiff Fidelity Savings and Loan Association (Fidelity) did not comply

with the requirements enumerated in 12 U.S.C. § 1729(c)(2). The question now presented is the scope and effect of that order and any additional relief to which the plaintiff may be entitled.

The court has carefully considered the briefs and arguments of counsel and the applicable statutes and concludes that the appointme of the federal receiver extinguished any preexisting state receiverships. Additionally, the court concludes that the mandates of the due process clause contained in the Fifth Amendment to the United States Constitution require that all assets presently held by the federal receiver be returned to Fidelity and that all actions taken under such receivership are voidable at the instance of the plaintiff as the aggrieved party. However, the court further concludes that it has neither the power nor the inclination to order the FHLBB or FSLIC to take any actions or make any guarantees to Fidelity if it were to choose to reacquire the association's assets.

DISCUSSION

The defendants argue that the removal of the federal receiver by this court would result only in the return to the state receiver of any remaining assets and liabilities in the possession of the federal receiver. This court disagrees. When the FHLBB imposed a federal receivership, that action necessarily extinguished any preexisting state receiver and vested exclusive jurisdiction over such receiver with this court. 12 U.S.C. § 1464(d)(6)(A), (C); 12 U.S.C. § 1729(c)(2). In fact, the defendants previously took the correct position that federal law clearly was intended to permit the FHLBB to remove receiverships of state-chartered associations from the jurisdiction of the state courts and put them under the jurisdiction of the federal courts. (Defendants' Memorandum in Support of Summary Judgment, at p. 19.) As such, the state court receiver no longer existed as a matter of law and any remedies previously available to the association under state law could not be pursued.

Therefore, the question before this court is the scope of the remedy to be afforded the plaintiff for the wrongful seizure of its association. Section 1464(d)(6)(A) empowers this court to conduct a hearing *on the merits* and to order the FHLBB to remove

the receiver for the state association. Section 1464(d)(6)(C) further provides that no court, other than the federal court hearing the action on the merits, may restrain or affect the exercise of powers of functions of the federal receiver, except at the instance of the FHLBB.

The defendants argue that the only power this court reserves in such a hearing is to remove the receiver, notwithstanding that the receiver may have already transferred some or all of the assets to a newly created association pursuant to section 1729(b)(4). This argument, if accepted, would render the plaintiff's statutory right to judicial review of the takeover meaningless. Clearly, fundamental concepts of due process and fairness require that the association has the right, if it chooses to exercise it, to render void the actions taken by the wrongfully appointed receiver and to reacquire its assets.

As a general rule, due process requires notice and an opportunity to be heard prior to a governmental deprivation of property. *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972). However, it is well-recognized now in the area of regulatory takeovers of failing institutions, *ex parte* governmental takings are permitted as long as the aggrieved association retains the ultimate right to a judicial review of the agency's action. Fundamental due process and fairness require that a meaningful hearing must be had *before* one is finally deprived of his property. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 611, 94 S.Ct. 1895, 1902, 40 L.Ed.2d 406(1974).

If this court were to accept the defendants' interpretation of the powers of this court under a section 1464(d)(6)(A) hearing, the federal regulators would be permitted to take over a state association in violation of statute yet successfully prevent reacquisition by immediately transferring the assets to a new association. While the need for swift and decisive action is great in the area of failing financial institutions, shielding federal regulators from a meaningful judicial review of their actions clearly violates the precepts of fundamental fairness required by the fifth amendment. It was for this reason that Congress required for the most expedited of procedures to allow aggrieved state associations to challenge federal intervention.

Notwithstanding these principles, however, the court recognizes the need for federal regulators to take immediate actions to attempt to conserve the assets of a failing institution. *See Fahey v. Mallonee,* 332 U.S. 245, 67 S.Ct. 1552, 91 L.Ed. 2030 (1947). Moreover, the court is also mindful that many of these steps may need to be taken before there is time for the expedited judicial review. Thus, in order to guarantee that those steps can be taken without the cloud of future litigation foreclosing many necessary actions, the court concludes that the actions taken by the federal receiver before a judicial determination are entitled to a facial determination of validity. As such, these actions are not void as a matter of law, but rather voidable and binding until they are voided by the party entitled to do so. *Cf. United States v. Peco International, S.A.,* 248 F.Supp. 250, 253 (D.Can.Zone 1965); 92 C.J.S., Void, pp. 1024-25.

This interpretation preserves both the integrity of interim federal actions and the due process rights of the aggrieved association. Specifically, it means that the aggrieved association can choose to render the federal receiver's actions void and have its assets returned or it can, if it deems it in its best interests, choose to ratify such actions and accept the removal of the receiver and the return of any assets held by that receiver as just compensation for the property seized by the government in violation of its due process rights.

In the present case, the plaintiff has indicated to the court through the argument of its counsel that it would not choose to have its association returned to it unless this court could require the defendants to make certain loans and guarantees made available to its successor, Fidelity Federal. However, after careful consideration of the jurisdictional limitations contained in the statute and the extraordinary nature of plaintiff's request, this court rules that such an order cannot be entered. While this court has the authority to order the FHLBB to remove the receiver and to return any assets that were wrongfully taken or subsequently transferred, it cannot sit in the position of a federal regulatory agency and determine whether future loans or other regulatory decisions should be made.

Therefore, in light of the statements made by plaintiff's counsel at oral argument, the court concludes that the federal receiver must be removed and the assets held by it (the claim against the Home Loan Bank of San Francisco and any net worth at the time of the takeover) returned to Fidelity.

IT IS SO ORDERED.

APPENDIX D

FIDELITY FINANCIAL CORPORATION,
Plaintiff,

v.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO,
Defendant.

No. C-82-1389 SW.

United States District Court,
N.D.Cal.

Oct. 3, 1983

ORDER GRANTING IN PART, AND DENYING IN PART, DEFENDANT's MOTION TO DISMISS

SPENCER WILLIAMS, District Judge,

ORDER AND MEMORANDUM OF LAW

Defendant Federal Home Loan Bank of San Francisco's (Bank's) motion to dismiss plaintiff Fidelity Financial Corporation's (Fidelity's) claims for failure to state cognizable claims for which relief may be granted, requires this Court to accept Fidelity's allegations of Bank's 'dastardly deeds' in connection with the events leading to its closure and federal receivership, as true. On that premise, defendant's motion is hereby GRANTED in part, and DENIED in part.

The following is a brief summary of Fidelity's contentions, interspersed with facts that are basically undisputed.[1]

In 1974, Bank initiated a special program concerning advances to member associations which, in its opinion, had less-than-rosy financial credentials ("Other Special Credit" (OSC)). This pro-

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[1] A more complete description of the allegations relating to the events immediately preceding the collapse of the plaintiff's control over the assets and business activities of Fidelity Savings & Loan, are presented in this Court's opinion in a companion case, reported at *Fidelity Savings and Loan Ass'n v. Federal Home Loan Bank Bd.*, 540 F.Supp. 1374, 1379-81 (N.D.Cal.1982); *rev'd* and *rem.*, 689 F.2d 803 (9th Cir. 1982).

gram offered less attractive interest and lending provisions and included: (a) A 2% interest rate penalty surcharge, (b) higher interest rates on "advances" than those charged on regular credit, (c) exclusion of alleged "black sheep" associations from participation in regular programs, (c) mandatory renewal of all maturing regular credit as OSC advances, and (d) certain other restrictions. Fidelity alleges that the OSC program was a purposeful attempt by the Bank to regulate management of the member associations along guidelines considered by Bank to be "prudent" and meting out punishment to those associations which failed to abide thereby.

ON October 26, 1979, after the Federal Reserve Board decontrolled interest rates, Fidelity applied to Bank for an advance of $75,000,000 to cover both short term loan commitments and anticipated savings withdrawals. Although it alleges that it had no reason to suspect that its request would be denied, this request was met with regular credit denial and placement into this newly-instituted OSC program.

Fidelity appealed this administrative decision of Bank's staff to the executive branch of Bank — "Credit Exceptions Committee of the Board of Directors" — who, rubber stamping the staff's recommendations, rejected Fidelity's requests. The Committee referred the matter to the entire Board of Directors, which notified Fidelity, by letter of April 5, 1982, of its refusal to excuse Fidelity from the OSC program.

Fidelity now alleges that all of its ensuing problems with its failing financial condition can be traced to Bank's fateful decision to place it into this punitive interest program.

We note that Fidelity alleges that it was the first, last and only association to be placed in this program.

The receivership action, which is also pending in this court (C-82-1592-SW), focuses attention upon the most visible penultimate effect of Fidelity's deteriorating financial condition — the

carefully orchestrated closure and imposition of the FSLIC receivership by the California Savings and Loan Commissioner.[2]

Essentially, Fidelity charges, and we accept for the purpose of the instant motion, that Bank, determined to wrest Fidelity from its then officers and directors, manipulated its statutory authority to lend funds to member associations in order to cast Fidelity into a state vulnerable to imposing a receivership. By this novel, and spiteful abuse of this authority, Bank instead could decide which associations could be crushed beneath the unauthorized and heavily punitive OSC charges. Fidelity seeks to recover approximately $176 million damages: $62 million which it claims represents the excess interest it was forced to pay the Bank for these OSC advances, and the balance representing its consequential damages from the Bank placing it into the OSC program.

Fidelity bases its compliance on four alternative causes of action: (1) that Bank's actions in initiating and placing Fidelity into the OSC program exceeded its statutory authority under 12 U.S.C. § 1421 *et seq.* (Bank Act); (2) that the Bank violated Fidelity's rights under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (APA) to certain procedural safeguards prior to its placement in this OSC program; (3) that Bank's actions deprived Fidelity of its constitutional rights of due process and equal protection under the 14th Amendment and; (4) that Bank's actions violated its common law fiduciary duties toward Fidelity (fiduciary duties).

LAW:

Both sides offer general framework and characterizations of Bank's role in attempting to cast the four issues raised by Bank's Motion to Dismiss.

There are also several "red" herrings that both parties offer as emotional catalysts.

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[2]Trial on the property of the receivership will commence in coordination with the remaining issue of this case — breach of any fiduciary duties owed to the shareholder here — with evidence segregated, according to its relevancy, for presentation in a bifureated trial.

We note that although these questions, *inter alia,* might do much to focus our passions, they lend little to resolution of the broad issues raised by the defendants' motion. [3]

The "real" issues in this case are: (1) Does Fidelity have an implied private right of action under the Bank Act to challenge the Bank's actions in this Court; (2) Is the Bank an "agency" under the APA, for the purpose of its dealings with Fidelity; (3) Is there any real substance to Fidelity's constitutional challenges to the Bank's economic regulation of its activities; and, (4) Does the Bank Act preempt the common law doctrines applicable to evaluate the parties' dealings, or does it incorporate by reference those standards. We discuss each of these below.

Bank Act

The Bank Act is a narrowly drawn, and largely unambiguous statute which establishes a system of national and state chartered savings associations under the auspices of a national board with plenary administrative powers, with delegation of certain subsidiary functions to various regional banks. Although the equity investors in successful lending associations would no doubt prosper from the Bank Act by a strengthened market for their services, there is little room for debate as to who Congress

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[3]These issues include:

1. Whether the OSC program is "regulatory" or "punitive."

2. If Fidelity's payments to the Bank were made voluntarily or, as made under economic and business "compulsion," were they made under "duress" rendering them "involuntary" and thus refundable.

3. Whether the Court has the discretion to award any type of remedies it feels appropriate, regardless of the legal authority under which it pursues this case.

While we do not criticize the parties for raising these, as well as other issues, we do not consider these peripheral issues here. We do not view these characterization-type questions as determinative of whether plaintiff has a cognizable cause of action under any of the theories presented; they are largely affirmative defenses, which would properly be presented to the finder of fact, or court, at trial on the merits. Some or all of these matters may be relevant at a trial of the question of the Bank's fiduciary obligations, if any.

intended as the ultimate beneficiaries of this legislation. The Act was primarily a populist measure to encourage private ownership of family homes.[4]

Opportunity for this Court to judicially imply private rights of action has been considerably constricted by recent decisions finding those rights rare indeed. Appeals to this Court's discretion to consider equitable arguments in support or opposition to a private right of action under legislation have little place, in light of the rigorous standard which emerges from those recent cases.[5] Even if congressional policy has resulted in an outcome which runs roughshod over common sense and fair play, we are barred from smoothing out the rough edges of the Act in the manner that Fidelity urges here.

Regardless of the allure of Fidelity's arguments that the Bank's development of, and placement of Fidelity into, the OSC program exceeded its statutory authority under the Bank Act, the Bank maintains that Fidelity is without express or implicit standing to challenge Bank's dastardly deeds in this Court under the Bank Act. We agree with Bank.

Fidelity does not have an express private right of action against the Bank under the Bank Act. Fidelity does not contend that the Bank Act expressly confers a private right of action upon member associations to contest the Board's or Bank's actions. The language of the Bank Act does not provide for such a right of action; if there is a private right of action under the Act, it necessarily must be derived by judicial implication.

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[4]It is clear that Congress established this system to increase the flow of available funds to finance the development of an industry to realize the dream then, as now, of creating a nation of affordable privately owned housing.

[5]Although it is our impression that it would be appropriate for an entity in Fidelity's position to have standing to challenge a particular Board or Bank decision with such drastic ramifications, it is legislative intent, rather than equitable or common sense notions, which must control our disposition of Fidelity's assertion of a private right of action.

Fidelity does not have an implied private right of action against the Bank under the Bank Act. Despite Fidelity's attempt to circumvent the very restrictive interpretation that both the U.S. Supreme Court and the Ninth Circuit has applied to *Cort v. Ash*,[6] recent cases support a drastically narrowing scope of implying private rights of action, and our reading of the most recent Supreme Court opinions, show a marked shift away from reliance upon the private right of action to police statutory obligations of regulated entities.[7]

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[6]See *Cort*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). *Cort* marked a radical departure from prior law; *see, e.g., Texas & Pacific Railway Co. v. Rigbsy,* 241 U.S. 33, 39 36 S.Ct. 482, 484, 60 L.Ed. 874 (1916), which could aptly be summarized as ensuring that where there is a statute, there may be many with standing to bring suit to enforce it. Cort signalled a new restrictiveness; some might say it was a "stop-gap" measure to curb expotential growth in federal litigation of new legislatively conferred benefits and property rights.

[7]*See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran,* 456 U.S. 353, 102 S.Ct. 1825, 72 L.Ed.2d 182 (1982) (implied private right of action under the Commodity Exchange Act); *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n.,* 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981) (no private right of action under federal water pollution act or marine protection and conservation act); *California v. Sierra Club*, 451 U.S. 287, 101 S.Ct. 1775, 68 L.Ed.2d 101 (1981) (no private right of action under § 10 of federal rivers appropriations act); *Texas Industries Inc. v. Radcliff Materials, Inc.,* 451 U.S. 630, 101 S.Ct. 2061, 68 L.Ed.2d 500 (1981) (no private right of contribution from antitrust co-conspirators for indemnification of treble damages under either Sherman or Clayton Acts); *Universities Research Association v. Coutu*, 450 U.S. 754, 101 S.Ct. 1451, 67 L.Ed.2d 662 (1981) (no private right of action under Davis-Bacon Act to enforce wage rate guidelines); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 100 S.Ct. 242, 62 L.Ed.2d 146 (1979) (no private right of action implied under the Investment Advisors Act); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979); (no private right of action under SEA '34 § 17(a)); *Cannon v. University of Chicago,* 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979) (implied private right of action under Title IX); *but c.f., Herman & MacLean v. Huddleston,* 459 U.S. 375, 103 S.Ct. 683, 74 L.Ed.2d 548 (implied

In *Cort*, the Supreme Court "unanimously decided to modify its approach" of generously conferring private rights of action, in addressing the appropriateness of a private litigant recovering damages for violation of a criminal statute never thought to include a private remedy before. As the Court later summarized its ruling in *Cort*,

> (i)n rejecting that claim the Court outlined criteria that primarily focused on the intent of Congress in enacting the statute under review. The increased complexity of federal legislation and the increased volume of federal litigation strongly supported the desirability of a more careful scrutiny of legislative intent . . . . Our cases subsequent to Cort v. Ash have plainly stated that our focus must be on 'the intent of Congress' . . . 'The key to the inquiry is the intent of the legislature.'

Curran, supra 102 S.Ct. at 1838-39. *Cort* established a four-fold approach to divining congressional intent to afford a private right of action: (1) was the plaintiff a member of the class "for whose especial benefit the statute was enacted"; (2) was there indication of legislative intent, explicit or implicit, either to provide a private right of action or deny one; (3) is it consistent with the statute's underlying purpose to grant a private right of action; and, (4) is the cause of action in an area of law traditionally left to the states. While these four tests were, and are still periodically, recited in subsequent case law, there has been an increasingly jaundiced eye turned to argument in favor of such rights.

There are unmistakable indications of the disfavor with which these implied private rights are currently viewed. First, the Supreme Court has collapsed the four "tests" of *Cort* into one comprehensive, and strict, inquiry into congressional intent to provide such a private right. This overshadows all the other "softer" policy inquiries; in almost every post-*Cort* case, the Court's conclusion turned upon what Congress explicitly said — either in the language of the statute, or in the legislative debates accompanying its passage. The analytical "streamlining" evident

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private right of action under the SEA '34 § 10(b) "beyond peradventure").

in the latest batch of Supreme Court opinions is echoed faithfully, and with more severity, in the Ninth Circuit.

In *Osborn v. American Assn. of Retired Persons*, 660 F.2d 740, 743 (9th Cir.1981)[8], the Ninth Circuit refused to imply a private right of action in favor of employees alleging violation of an "equal pay for equal work despite advancing age" statute, on grounds that

> the *sole factor* to be considered in deciding whether a private right of action should be implied under a statute is *whether Congress intended* that the statute's provisions be enforced through private ligitation. (. . .) Factors relevant to evaluation of congressional intent are the *language of the statute itself*, its legislative *history*, the underlying *purpose and structure* of the statutory scheme, and the likelihood that Congress intended to supersede or to supplement existing state remedies.
>
> It is obvious that individuals employed pursuant to the Act, such as *appellees, were intended by Congress to benefit* from enactment of (the Act). To permit implication of a private right of action, *however*, the language of the statute must do *more than confer benefits* . . . .

Id. at 743, *emphasis added.* At first blush, this standard does not bespeak a drastic shift from *Cort*, but as Goodwin, J. points out in his concurrence, this establishes an even stricter standard than *Cort*. In a footnote to the majority opinion, the Ninth Circuit read the post-*Cort* cases as setting a tougher standard for finding congressional intent for a private right of action, and read then recent cases: *Transamerica Mortgage, Sierra Club, Universities Research* and *Touche Ross*

> as having made *clear that express conference* of federal rights by the statutory language is *necessary, rather than merely*

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[8]The best example of the Ninth Circuit's very restrictive interpretation of Cort and its progeny strongly supports the Bank's argument against granting private rights of action under the Bank Act.

> *sufficient* for a court to *find that Congress intended to create* a private right of action when it enacted the statute.

Osborn, supra at 743, n. 1, *emphasis added.*

Since *Osborn,* the Circuit has denied an implied right of action to discharged employees allegedly fired in contravention of a federal statute, which prohibited discharge on account of garnishment of their wages. *Le Vick v. Skaggs Companies, Inc.,* 701 F.2d 777 (1983). In *Le Vick,* Norris, J. tersely summarized the standards for implying private rights of action, as having "substantially changed" from

> focusing on whether the purposes of a statute would be achieved by implication of a private right of action, (to) . . . focusing on whether Congress intended to create a private right of action, regardless of its purpose in enacting the statute.

Le Vick, supra at 779. Obviously, the Ninth Circuit has explicitly "repudiated" the notion that courts should imply private rights of action whenever they feel that such rights would "improve" the statute as written. *Id.*

The Supreme Court and the Ninth Circuit have abandoned *"ubi jus, ibi remedium"* ["where there's a right, there's a remedy"] as their guide to implying private rights of action. *See Texas Industries, supra; Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978); *Piper v. Chris-Craft,* 430 U.S. 1, 97 S.Ct. 926, 51 L.Ed.2d 124 (1977). *Le Vick, supra,* would seem to both (1) require we focus on whether Congress intended to provide this remedy to Fidelity, regardless of whether in general it hoped the Board or the regional banks would not misuse their office, and would "play fair and square" with member associations; and, (2) that district and appellate courts read the omission of specific provision for member associations' private right of action as evidence of contrary intent. *Le Vick, supra* at 779.

Finally, as recently summarized by the Supreme Court,

> the ultimate question is one of congressional intent, not one of whether this Court things that it can improve upon the statutory scheme that Congress enacted into law.

Touche Ross, supra 442 U.S. at 578, 99 S.Ct. at 2490 (1979). This quote appears to vitiate Fidelity's attempt to encourage our broad reading upon the third and fourth tests in *Cort*.

Fidelity argues, in light of *Cort*, that savings and loan associations were the intended "special beneficiaries" of the Bank Act. A dispassionate review of the legislative history and text of the Act convinces us that would-be homeowners were supposed to be the primary beneficiaries of the greater availability of mortgage money. At most Fidelity can argue that Congress envisioned the associations as necessary conduits by which to disperse mortgages, more or less by private market forces, throughout the U.S. Fidelity was an "incidental beneficiary" of this quasi-regulatory scheme, in much the same way as were the regional Banks, if the system prospered. But the case law is clear that merely "incidental", or secondary, beneficiaries of a statute do not qualify under the *Cort* "especial beneficiary" standard.[9]

Fidelity urges that this Court permit it a private right of action by adopting the more lenient standard it argues the Sixth Circuit endorsed in *Assoc. of Data Processing Service Organizations v. Fed. Home Loan Bank Board*, 568 F.2d 478 (6th Cir. 1977) (*"ADAPSO"*). In *ADAPSO*, the Sixth Circuit permitted a trade association representing electronic data processors a private right of action under § 11a of the Bank Act. The trade association sought declaratory and injunctive relief in the federal courts restraining the Bank of Cleveland from competing with ADAPSO members' provision of certain computer services to member associations. The Sixth Circuit's reliance upon "legislative . . . silence" to find a private right for ADAPSO's challenge is not the law of this Circuit, and appears to have been implicitly reversed by the most recent Supreme Court opinions: *Transamer-*

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[9]*See e.g., Local Div. 732 etc. v. Metro. Atlanta Rapid Transit Authority*, 667 F.2d 1327, 1335 (11th Cir. 1982); *Stern v. Merrill Lynch*, 603 F.2d 1073 (4th Cir. 1979); *California v. Sierra Club, supra; Universities Research Assoc. v. Coutu, supra.*

ica Mortgage, Touche Ross, Universities Research, and the Ninth Circuit opinions in *Osborn, Le Vick,* and *In re Mexico City Aircrash of October 31, 1979; Haley v. Western Airlines,* 708 F.2d 400, 406-08 (9th Cir. 1983).

It is our impression, upon reviewing the Supreme Court and Ninth Circuit precedent, that the reasoning and result of *ADAPSO* is anomolous, and although never officially reversed, has never been accepted in this Circuit. Even if this Court were compelled to harmonize our result here with *ADAPSO,* we do not find it supports the propositions for which Fidelity cites it. *ADAPSO provided implication of a private right of action only for declaratory and injunctive relief.*

Additionally, it is becoming increasingly apparent that Congress may be satisfied by providing less than a full complement of available challenges when drafting various statutes. A recent Ninth Circuit case, *Sierra Club v. Peterson,* 705 F.2d 1475 (1983) has confirmed that the appearance of a statute may convey the impression that less than a full panoply of remedies are intended to be available by Congressional choice.

In *Lee Construction Co. v. Federal Reserve Bank of Richmond,* 558 F.Supp. 165 (D. Maryland 1982), the district court determined that the Fed. Reserve Banks, analogous to the Federal Home Loan Banks here, were federal "agencies", as well as held that 12 U.S.C. §§ 341 et seq. did not provide plaintiff a private statutory right of action to challenge the regional Federal Reserve Bank's conduct of its affairs in "a prudent and reasonable manner", after considering the same restrictive post-*Cort* precedents we discussed above. In the case of the defendants here, as was the case in *Lee Construction Co.,* supervision and enforcement of the defendant regional bank's compliance with its duties under an enabling statute seemingly has been exclusively entrusted to a regulatory board, instead of shared with private parties. *Lee Construction Co., supra* at 186, n. 31.

Although we readily acknowledge an inherent danger in using legislative history, or comparing and contrasting similarly drafted legislation, as a tool in interpreting the Bank Act, we note that a second savings industry bill, the Home Owners Loan Act, the

focus of extensive scrutiny, has similarly been deemed without an implied private right of action. *First Hawaiian Bank v. Alexander*, 558 F.Supp. 1128 (D.Haw.1983). While we do not feel compelled to concur with the Defendant's arguments against Plaintiff's cause of action under the Bank Act in light of *First Hawaiian Bank*, we concur in the method of analysis employed there, and reach a similar conclusion here. Id. at 1131.[10] Denying Plaintiff an implied private right of action to challenge the statutory authority of the Bank to institute, and to classify associations as appropriate candidates for, the OSC program, is in harmony with the Ninth Circuit's narrow construction of available direct challenge to the Bank Act by regulated entities or their investors. *See, Fahey et al. v. O'Melveny & Meyers, et al.*, 200 F.2d 420, 444 (9th Cir. 1952).

Since, Fidelity has neither an express, nor implied, private right of action to bring suit upon the Bank's compliance with provisions of the Bank Act, we must grant the Bank's motion to dismiss Fidelity complaint founded upon the Act's provisions.

APA claim

Fidelity claims restitution of the amounts the Bank charged in under the OSC program is appropriate, if the Bank's decisions in that regard were improper under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551(1), or § 701(b)(1). The Bank assets that Fidelity's reliance upon the APA is infirm for two principal reasons: (A) that the Bank is not a "federal agency", and thus not within the APA's ambit; and, (B) only declaratory or injunctive relief, not monetary restitution is appropriate under the APA.

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[10]We acknowledge defendant's attempts to distinguish the HOLA from the Bank Act, for purposes of denying plaintiff a cause of action upon alleged breach of its (defendant's) fiduciary obligations to its member associations. Clearly defendant may not have it both ways; we conclude that Congress could not have intended that the accountability of the regulated entities be *completely* internally inconsistent, depending upon which form a challenge assumed.

(A) IS THE BANK AN "AGENCY", AS THAT TERM IS DEFINED IN THE APA?

The Bank maintains that it is a "government controlled corporation", rather than an "agency". We reject this hypertechnical distinction mustered by the Bank as a formalistic attempt to cast itself as a *sui generis* hybrid to avoid the accountability that the APA would demand of it. Whether one prefers a literal, or a teleological, approach to characterization, it is clear to this Court that the Bank is an "agency" for the purpose of invoking this Court's review under the APA.

To the extent that we as literalists require precedent, *Fahey, supra,* would support this conclusion.[11] *Fahey* was an action under the Bank Act by the investors (member associations and other interests) in the former federal home loan bank located in Los Angeles, against its successor: the newly-formed Bank of San Francisco, for damages which allegedly resulted from the merger of two regional banks, then in Portland and Los Angeles, into one facility in San Francisco. In *Fahey,* the Ninth Circuit rejected the disgruntled investors' argument that the Los Angeles branch's closure was confiscation of private property interests, and held.

> that the Congress of the United States . . . intended to, and did, create a Federal agency and instrumentality of the legislative branch of the federal government to carry out and discharge important governmental function, to wit, the furnishing of reserve banking facilities for savings and loan associations and similar institutions within a district created by the Board.
>
> We hold that all Federal Home Loan Banks within the system are, and operate as, public banking agencies and

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[11]We note, however, that we have been instructed in the companion case, 540 F.Supp. 1374 (N.D. Cal. 1982), to interpret the applicable law without the meticulousness traditionally applied to their interpretation, yielding instead to the "teleological" result. In this instance, we are certain that the two merge; that, as a *quid pro quo* for expedited seizure of private assets, without insistence upon the "ceremonial formalit(ies)" of law, we must deem the Bank a federal agency for this purpose. *See Fidelity Sav. & Loan,* 689 F.2d at 813.

> instrumentalities of the federal government, and such (cannot import the common law corporate doctrines to support) a justiciable (and proprietary) interest in their continued existence.

Id. at 446-47.

Holding the Bank to be a federal agency accommodates our interest in providing investors in these S & Ls with the opportunity for meaningful *ex ante* administrative and judicial review under the APA, as a procedural safeguard from "functionally" dispositive rule-making by the Bank, without frustrating the apparent intent of the Bank Act not to provide an *ex post* damage remedy for injuries inflicted by these rules.

(B) CAN FIDELITY RECOVER MONETARY DAMAGES UNDER THE APA?

Despite the appeal of Fidelity's novel circumlocution, we cannot agree that restitution, in the form of monetary damages, is available under the APA. The law on this issue is unambiguous; the APA does not confer upon federal courts the authority to assess and levy monetary relief ex post to compensate those injured by tortious agency action. The APA was intended to, and can, when appropriately invoked, protect those threatened by adverse agency action with swift anticipatory judicial review of those decisions.

Fidelity should have sought this Court's review of the Bank's sinister motives and nefarious conduct, which it contends was without legislative authority, when the noose with the OSC "lead sinker" was first slipped around its neck. Its failure to take timely recourse to the avenue of relief provided under the APA, whether for business reasons or otherwise, renders Fidelity's plea for redress a bit much, and a bit too late.

By this conclusion, this Court neither contradicts common sense, nor frustrates congressional intent, as would our endorsement of either party's positions *in toto*. Interestingly, while to provide Fidelity a private right to week monetary damages under the APA after the Bank had injured its interests would directly contravene the ruling made above; *i.e.*, that the Bank Act does not

provide for an implicit or explicit private right of action, ruling that Fidelity could have sought, under 5 U.S.C. § 706, a court ruling "compel(ling) agency action unlawfully withheld", or "hold(ing) unlawful and set(ting) aside" agency action found to be arbitrary or in excess of statutory authority, would be entirely sensible. *See Kester v. Campbell,* 652 F.2d 19 (9th Cir. 1981). The result reached here coordinates the language and purposes of both the Bank Act and the APA, permitting an expedited judicial review of the " 'life and death' type of control" which the Bank Act permits the Board and Bank, and yet does not permit Fidelity to turn either on its end, and thus leapfrog well-conceived limitations in both.

Reviewing Fidelity's allegations in both this action and the receivership action before the Court, this Court has much empathy with Fidelity's plight. We assume, as we must for purposes of this motion, that the Bank officials instigated the OSC program with the hope and purpose of saddling Fidelity with insurmountable obstacles to financial recovery because of personal differences of opinion regarding prudent banking practices, as well as personality clashes. However personally abhorrent we deem this display of arrogance and abuse of delegated responsibilities, the Circuit has specifically declined to extend special procedural safeguards to members' interests, despite foreseeable frictions between a member association(s) in failing financial straits and a regulatory body with discretion to apply either the carrot of plentiful short-term bailout, or the whip of the heavily punitive terms of the OSC. By assuming that S & L investors do not plunge "blindly" into a heavily-regulated industry, the Ninth Circuit demands that Fidelity accept both burden and benefits of the "plenary control" of the Board and Bank. *Fahey, supra,* at 444.

Constitutional claims

Fidelity's constitutional arguments are interesting, but unhelpful. There are two constitutional arguments: substantive due process/equal protection and procedural due process. We discuss each briefly, but not at the outset that the amount of actual judicial review available under either theory is minimal, especially when considered in light of *Fahey,* the very deferential stance appropriate in a due process review of economic regulation, and

the inherent frailty of Fidelity's argument that it had a "property" interest in receiving non-SOC advances.

(A) SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION:

For the purposes of this analysis, we assume that the Bank is a quasi-legislative entity, with the appropriate delegation of rule-making authority from the Board. As economic regulation, this Court's scrutiny of the OSC program under substantive due process and equal protection challenge is proper only with the greatest deference: is the OSC classification, and Fidelity's participation under its terms, so "patently arbitrary" and "utterly lacking in rational basis", that the court cannot conceive of any possible legitimate basis that the Bank might have had in its adoption? *U.S. Railroad Retirement Bd. v. Fritz,* 449 U.S. 166, 168, 101 S.Ct. 453, 456, 66 L.Ed.2d 368 (1980).

Under such a deferential standard, we must affirm the legitimacy of the Bank's institution of the OSC program, and their interpretation of the criteria. Fidelity cannot establish that the purposes of the regulation could not have been legitimate, in view of the larger statutory authority of the Bank Act. Moreover, even if Fidelity could meet this burden, it must also establish that the OSC could not have rationally been expected to advance the broad aims of the Bank Act. This is practically an impossible burden. *City of New Orleans v. Dukes,* 427 U.S. 297, 806, 96 S.Ct. 2513, 2518, 49 L.Ed.2d 511 (1976).

Additionally, Fidelity has not established that adoption of the OSC and its placement into the program was "state action". Even though we have previously decided here that, for the purposes of triggering review of the Bank's actions under the APA, the Bank is an "agency" of the U.S., we conclude that the establishment of the OSC terms or the Bank's decision to lend Fidelity advances under those terms was not "state action". These conclusions are entirely consistent with the main stream of case law which permits such a distinction. *See, e.g., Jackson v. Metropolitan Edison,* 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974) ("[t]he mere fact that a business is subject to [government] regulation does not be itself convert its action into that of the

government for constitutional purposes. *Id.* at 350 [95 S.Ct. at 453]"); *Roberts v. Cameron-Brown Co.*, 556 F.2d 356, 358 (5th Cir. 1977). *Compare Northrip v. Fed. National Mortgage Ass'n*, 527 F.2d 23 (6th Cir. 1975) (holding that foreclosure on mortgage not "state action", and thus could not triger due process clause scrutiny). If Fidelity cannot establish state action, it may not mount a substantive or procedureal due process clause challenge.

By sheer intuition, this Court senses that certain regulatory functions performed by the Bank are inherently governmental, just by the mere fact of those tasks' delegation from the Board, which is also clearly a governmental arm; likewise, the lending, ministerial, and corporate functions of the Bank are so private enterprise-like that to call them "state action" would dilute that concept beyond recognition. The Bank's actions in making the OSC advances available to Fidelity were neither so inherently coercive, nor within traditional government functions, so as to make a finding that the Bank's programs are beyond substantive due process/equal protection scrutiny unjust.

(B) PROCEDURAL DUE PROCESS: NOTICE AND HEARING:

The Bank makes two arguments which destroy Fidelity's contention that it was entitled to a hearing and the right to notice prior to placement into this OSC program. The first argument is quite simple, yet dispositive: Fidelity had no protectible property interest in receiving funds under the regular credit terms of the Bank's lending programs. The Bank had plenary discretion to exercise its lending capacity, consistent with its responsibility to all its member associations and its obligations under the Bank Act to the Board to deny advances to any institution that it felt could not be made safely. Under § 9 of the Bank Act in pertinent part,

> (a)ny member or nonmember borrower . . . shall be entitled to apply in writing for advances. (. . .) Such Federal Home Loan Bank may at its discretion deny any such application, or subject to the approval of the board, may grant it on such conditions as the . . . Bank may prescribe.

Fidelity's *reductio ad absurdium* argument is that § 9 permitted the Bank to either reject an application totally, or approve an application, by application of the same, draconian lending terms to all applicants, regardless of their creditworthiness. This reading of § 9, even in light of Fidelity's attempt to harmonize § 7 of the Bank Act, is implausible. In § 7, the Bank's Board of Directors is charged with the fair and nondiscriminatory application of its lending powers to make

> such advances as may be made safely and reasonably with due regard for the claims and demands of other institutions, and with due regard to the maintenance of adequate credit standing for the . . . Bank and its obligations.

12 U.S.C. § 1427(j), in pertinent part. Fidelity would have this Court read § 7(j) in isolation, as barring the creation of different lending terms to suit different creditworthiness of borrowers. Not only would this totally eviscerate § 9, but would read much of § 7(j) out of the statute. Under its reading, Fidelity contends that the Bank could have legally denied them any advances under its lending policies, but could not legally, and with an eye to its statutory obligations, establish more stringent terms for weaker, and riskier, loans.

A fairer reading of the Bank Act, particularly §§ 7(j) and 9 *in toto*, compels the conclusion that the Bank had discretion to establish variable credit terms, subject to its statutory obligations. As we conclude later, the Board's motives in placing Fidelity into the program may not have been a fair application of these guidelines, in light of certain broader corporate law relationships between the two, opening the Bank up to potential liability under independent or collateral legal doctrines not preempted by the Bank Act, but the effect of §§ 7(j) and 9 is to confer plenary discretion upon the Bank to establish and implement its lending policies.

This Court could only find a "property interest" in a situation where a governmental or quasi-governmental entity establishes certain "objective and defined criteria" by which it promises that otherwise unfettered subjectivity or plenary discretion will be completely relinquished. These guidelines then ensure an

automatic right to receive the benefits, once the recipient establishes his eligibility by their terms. As currently before this Court, the OSC confers broad discretion to the Bank to draft and implement disparate credit terms premised upon its interpretation of the borrower's creditworthiness. Such discretion is incompatible with a finding that Fidelity has been conferred a protected property interest. *See, e.g., Board of Regents v. Roth,* 408 U.S. 564, 572, 92 S.Ct. 2701, 2706, 38 L.Ed.2d 548 (1972); *Santa Clara v. Andrus,* 572 F.2d 660 (9th Cir.), *cert. denied,* 439 U.S. 859, 99 S.Ct. 176, 58 L.ED.2d 167 (1978). *C.f., Leis v. Flynt,* 439 U.S. 438, 99 S.Ct. 698, 58 L.Ed.2d 717 (1979).

Second, Fidelity argues that its procedural due process rights were abridged because the timing of the hearing it ultimately received was inherently inadequate to avert the fatal blow to Fidelity as a result of being placed into the program. The resolution of this issue is far more troublesome than our concluding that Fidelity had no property interest in the advances.

The Bank argues that, even if Fidelity were to have been entitled to a hearing, it may not blame any of its losses to the denial of a pre-OSC hearing, since when ultimately granted a hearing, the Board of Directors confirmed its decision. Strung as so many beads on a string, this hastily reconstructed explanation may be logical, but provides little help in assessing the Bank's hand in sealing Fidelity's doom. To maintain, as the Bank suggests here, that if Fidelity cannot prove that by its denial of an earlier hearing, the Bank was the proximate cause of its damages, is of little value to its motion to dismiss. It also impliedly assumes that the Board's ultimate review was fair and adequate, as well as that a later hearing was unobjectionably equivalent to an earlier one.[12] However, the lynchpin of this analysis is that Fidelity has a "property" entitlement to its participation in the Bank's lending

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[12]There is a troubling gap which the Bank ignores: couldn't Fidelity have appealed the Bank's adverse decision to the Board, arguing all these statutory contentions, in a timely manner to give it a chance for meaningful relief, with the opportunity for Fidelity to seek judicial review under the APA, if it had a pre-OSC hearing? This question is subsumed under the APA "Agency" discussion.

program, at a set and nonvariable rate. This Court cannot go this far.

Fidelity did not have a property right in receiving the advances upon the regular terms from the Bank, and cannot pursue a Fifth Amendment due process claim against the Bank.[13]

Fiduciary Duties

Fidelity asserts that, under federal common law, which may properly fill in the gaps left in the federal statutes regulating the entities involved in the savings and loan industry, the Bank owed it, as well as the other minority shareholders, various fiduciary duties commonly expressed in corporate law; *viz.* to use their corporate powers in a fair, just and equitable manner, in all their dealings. These include a lender/borrower relationship; Fidelity alleges that the Bank's instigation of the OSC program was with the intent to accelerate the defendant's crumbling fortunes. There is a technical problem with Fidelity's not naming the board of directors individually as co-defendants; however, we deem the Bank itself accountable for any breach of its directors' duties.[14]

The Bank argues that this Court should not imply any fiduciary duties between itself and the plaintiff, contending that the Bank Act, particularly §§ 7(j) and 9, completely defines and — by citation of a litany of dissimilar case law involving statutes, the defendant maintains — preempts common law embellishment of the Bank's requisite duties to the member associations. If federal statutory law is construed to consume the field, courts are not permitted to imputed common law into the "interstices" that the Court might find open to such allegations.

Even if Fidelity is not afforded private right of action to challenge the Bank's actions under §§ 7(j) and 9 of the Bank Act, it may still maintain a common law tort and corporate law action for damages suffered from the Bank's breach of its duties of fair

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[13]This is supported by dicta in *Fahey*, which expresses the view that the member associations have no constitutional rights to notice, hearing or formal findings of the Board. *Id.* at 427.

[14]See discussion at pps. 900-901, *infra*.

dealing and care. Taking the Bank at its word, we agree that it was Congress's intent to establish the Bank as a public corporation. By adopting the corporate model, Congress employed a short-hand signal that although the Bank was to perform certain public functions, this hybrid association was charged with all the duties, rights and obligations of corporations not inconsistent with its agency roles.

Fidelity must establish to the satisfaction of a jury reviewing the evidence of the OSC's adoption, as well as the ongoing negotiations between Fidelity and the Bank regarding its placement into that punitive category, that (1) its adoption was both not in furtherance of its regulatory functions under §§ 7(j) and 9; (2) its placement into the OSC a breach of its responsibility to Fidelity as a member association and minority shareholder; and (3) the amount of its damages which proximately resulted.

The Bank argues that the Act preempts common law corporate duties running between itself and the member associations. We conclude, from close examination of the statutory language, as well as careful consideration of the effect of permitting common law corporate fiduciary duties of fairness, care and loyalty to fill in its interstices, that the Bank Act doesn't preempt this question of the manner in which the regional banks and their directors are obliged to treat member associations. In fact, we feel that to conclude otherwise would render the Act, as now drafted, largely unworkable.

The language of the Bank Act is very specific in spots, very general in others. The structure and hierarchy of FSLIC, the Board, and the regional banks is quite detailed; the manner in which the regional banks are to operate is left to the agencies' rulemaking.[15]

Despite the Bank's argument, the Bank Act does not even remotely resemble the Federal Water Pollution Control Act, the

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[15]Interaction between the member associations and these agencies is left largely to interpolation of the thrust and parry of the business world; details which Congress wisely felt better determined by the exigencies of the marketplace.

statute involved in the *Milwaukee I and II* cases, *Illinois v. City of Milwaukee,* 406 U.S. 91, 92 S.Ct. 1885, 31, L.Ed.2d 712 (1972), *City of Milwaukee v. Illinois and Michigan,* 451 U.S. 304, 101 S.Ct. 1784, 68 L.Ed.2d 114 (1981), and the *Outboard Marine Corp.* case, *Outboard Marine Corp. v. Illinois,* 453 U.S. 917, 101 S.Ct. 3152, 69 L.Ed.2d 1000 (1981).[16]

The Band argues, and we basically agree, that there are two instances where federal courts are permitted to fashion or apply an existing body of federal common law[17]. The first is where congressional intent has either explicitly or implicitly been to leave the federal courts with the power to develop substantive law. The second is where a "federal rule" is necessary not only to a fair and consistent decision in the case at bar, but also when it would promote or protect uniquely federal interests in a manner that a state court applying a territorially based law could not. The Bank asserts that this case satisfies neither; we conclude, from our analysis of the Bank Act supra, and our review of the helpful, but not binding, cases that this instance satisfies both.

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[16]That statute is a paradigmatic instance of where a common law overlay would be inappropriate for two reasons. First, the language of the statute imparts operationally complete guidelines by which all parties can guide their actions and quickly determine compliance with its directives. Second, the form of the statute imparts an impression that it was intended to supplant the vagueness or variances found in the common law on the subject. *Milwaukee II,* 451 U.S. 304, at 314, 101 S.Ct. 1784 at 1791, 68 L.Ed. 2d 114 (1981). *C.f., e.g., Grassley v. Legal Services Corp.,* 534 F.Supp. 818, 827 (S.D. Iowa 1982) (no private right of action implied under the Legal Service Corp. Act, nor any room for federal common law of libel; *U.S. v. Waste Indust.,* 556 F.Supp. 1301 (E.D.N.C.1982) preemption clear from congressional intent to let expert agency sort out appropriate levels); *Van Orman v. American Ins. Co.,* 680 F.2d 301, 311-312 (3d Cir. 1982) (ERISA and "extensive regulatory network" and Congress has "expressly announced its intention to occupy the field.

[17]Federal common law is usually just a collection of the "best" state rules or a consensus, typically found in scholarly treatises or restatements, which is applied to law suits between diverse parties or involving a federal question.

Fidelity relies heavily upon *Barany v. Buller,* 670 F.2d 726 (7th Cir.1982), where the Seventh Circuit reversed the district court's finding that if no private right of action on behalf of deposed federal credit union board members could be implied, then they automatically had no remedy at common law. *Barany* reiterates the strictness of the post-*Cort* authority on implied private rights of action, but is quite persuasive on concluding that there are strong and "uniquely federal interests" promoted by the district courts' application of a federal common law to address the issues presented by human foibles in a federally regulated industry.

In assessing the appropriate application of common law fiduciary duties to judge whether the Bank directors individually, and as a body, discharged their responsibilities to Fidelity, we find little or no embellishment from the language of the Act. By this omission, we do not believe that congressional intent was to absolve the Bank's directors, then and always, of contemporary standards of conduct and mores of the marketplace. On the contrary, we can find intent to permit the Bank flexibility and operational autonomy, by permitting it much room to respond to its members' needs; by adopting a tried and true form of operation — a corporate model — and by avoiding drafting guidelines into the legislation. *See Milwaukee II,* 451 U.S. at 314, 320, 101 S.Ct. at 1791, 1794.

Here, requiring that the directors of the Bank adhere to a level of fiduciary responsibility demanded of their private or charitable corporate counterparts would be "necessary to fill in intersticially" and "effectuate the statutory pattern enacted" in large part by Congress. *Van Orman, supra* at 312. Although similarly left to judicial interpretation, the Bank, the Board, and stakeholders seek to hold the officers of member associations to common law fiduciary duties determined in the federal courts. *Rettig v. Arlington Heights S & L,* 405 F.Supp. 819 (N.D.Ill.1975).

[20] The many suits instigated by the Board, as the statutorily defined litigating arm of the government's interests, bear silent testimony to the hypocrisy of the Bank's argument that the Bank Act codifies all the duties and obligations of the entities

within its purview.[18] *See Reich v. Webb*, 336 F.2d 153 (9th Cir.1964). If the Bank through its proxy, the Board, may brandish the stick of federal common law at the member association, even if fashioned under the Home Owners' Loan Act, 12 U.S.C. §§ 1461 *et seq.*, rather than the Bank Act, so may its members. We find that the underlying rationale of the HOLA requires that the other statutes be read in harmony with it. *See Bev. Hills Fed. S & L Ass'n v. Fed. Home Loan Bank Board*, 371 F.Supp. 306, 312-314 (C.D.Cal.1978).

The Bank argues that, even were it to be deemed a fiduciary, Fidelity's claim must fail for three reasons. We have considered each: (1) that Fidelity cannot identify any "res" segregated in the Bank's coffers, which represents the sum Fidelity paid as the OSC surcharge; (2) that, since the OSC was paid voluntarily under an express contract between plaintiff and defendant, no claim for unjust enrichment may now be maintained; and, (3) that a breach of fiduciary duties, if any, was committed by the individual directors of the Bank, rather than the Bank itself. We discuss each briefly.

The "res" and "voluntary contract" arguments are so weak as to merit only the briefest attention in this order. It is this Court's understanding of the law that a tortfeasor should not be permitted to profit from his continuing misdeeds simply by commingling the overcharges with regular, clearly proper, interest charges. The "contract" argument is infirm in view of the overriding fiduciary obligations which link the Bank and its member associations; the trust and reliance that defendants owe their member associations create additional burdens beyond mere contractual duties. There is the additional layer, not found in arms' length negotiations, of the corporate law duties of loyalty, care and fairness, owed the member associations.

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[18]The Court is familiar with the Board's frequent and, of late, extensive recourse to suit against members' officers and directors in furtherance of their statutory responsibilities, premised upon federal and state common law. *See, e.g., FSLIC v. Ticktin*, No. C 83-2993 *et seq.*, filed in N.D.Ill., E.D. ____ 1983.

Plaintiff obviously seeks restitution and damages traced to the extraction of any wrongful charges by defendant. Although defendant's technical objection that the directors, not the Bank, owed any fiduciary duties that may have existed, is correct, it does not release the Bank qua Bank from its liability, if any. Clearly, any acts taken by the directors individually, and as a body, were taken in their official capacity and pursuant to their duties to the Board. Any monetary benefit to the rest of the member associations from the OSC program, or to the housing industry as a whole, inured to the system that plaintiff questions here. We can see no reason not to permit the Board to stand accountable for the actions of its highest level agents — its directors — under the doctrine of *respondent superior*.

Plaintiff here is left with two much smaller avenues for recovery after this motion to dismiss. It may choose to pursue an APA claim for injunctive or declaratory relief, which it has had since the institution of the OSC program; we will not permit monetary recovery of the OSC charges under the APA however. It may also maintain a federal suit for breach of fiduciary obligations owed it as a shareholding member of the Bank of San Francisco; under this theory, monetary damages are recoverable. If the Bank is correct in arguing that Fidelity could have sought alternative financing, and Fidelity did not, then the potential recovery would be diminished accordingly for its failure to mitigate its damages.

IT IS SO ORDERED.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

C 82-1389 SW

Fidelity Financial Corp.,
Plaintiff,

v.

Federal Home Loan Bank of San Francisco,
Defendant.

FINAL JUDGMENT

ORDER

Pursuant to our memorandum and order in this matter, also filed herewith, IT IS ORDERED THAT summary judgment be entered on the plaintiff's fourth claim for relief in its Third Amended Complaint in defendant's behalf, and that the entire matter be dismissed, with judgment entered for DEFENDANT.

IT IS SO ORDERED.

DATED: August 22, 1984

/s/ SPENCER WILLIAMS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

C 82-1389 SW

Fidelity Financial Corp.,
Plaintiff,

v.

Federal Home Loan Bank of San Francisco,
Defendant.

[Filed Aug. 20, 1984]

ORDER AND MEMORANDUM OF LAW

Upon consideration of the memoranda and arguments of the respective parties entertained at oral argument, in support of, and opposition to, defendant's motion to dismiss or, in the alternative, for summary judgment, IT IS HEREBY ORDERED THAT:

(1) Federal Home Loan Banks of Atlanta, Boston, Chicago, Cincinatti, Dallas, Des Moines, Indianapolis, New York, Pittsburgh, Seattle and Topeka ("Other Banks' ") and Federal Home Loan Bank Board's ("Board's") motions to intervene as *amicus curiae* for leave to file briefs in support of Bank of San Francisco's respective motions are GRANTED;

(2) the Bank's motion to dismiss Fidelity's fiduciary claim as improperly asserted against the bank as an instrumentality under common law, and not against the U.S. under the Federal tort Claims Act is DENIED;

(3) the Bank's motion for summary judgment on Fidelity's fiduciary claim, on the grounds that

(a) Fidelity has failed to produce any evidence within the scope of the Bank's common law fiduciary obligations to Fidelity is GRANTED;

(b) the Bank and its personnel are immune from liability for their discretionary acts is DENIED;

(c) the business judgment rule insulates business decisions of the officers and directors of the Bank from

judicial review unless there is evidence that these decisions were a product of fraud, bad faith or self-dealing on the part of those individuals is GRANTED.

(4) Bank's motion to dismiss Fidelity's third claim for relief asserted under the APA, on the grounds of mootness, no case or controversy and lack of a justiciable issue is GRANTED.

(5) the Bank's and Fidelity's cross-motions *in limine* to limit or exclude certain issues, evidence or proof at trial is DENIED as moot;

(6) the Board's motion *in limine* to limit or exclude certain issues, evidence or proof at trial from the scope of the receivership trial is withdrawn, pursuant to stipulation of the parties.

INTRODUCTION:

We are at the end of the line for Fidelity Financial Corporation's ("Fidelity's") tort claim against the Federal Home Loan Bank of San Francisco ("Bank"). Although our earlier order[1] assured Fidelity of a judicial review of its allegations of arbitrary, discriminatory and unlawful conduct on the part of the Bank and its officials, we find, as a matter of law, that despite almost two and one half years of unrestricted discovery, Fidelity can neither prove its allegations of "dastardly deeds" by the Bank, nor establish a single material issue of fact in dispute as to those acts.

As we decided in *Fidelity II*, the Bank was completely within its statutory authority to adopt a credit program which provided different credit terms for different borrowers, based upon its statutory powers under the Bank Act, §§ 7(j) and 9. We held that the Bank Act gave the Bank "plenary discretion . . . to establish

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[1]Fidelity Savings & Loan v. Fed. Home Loan Bank Board, et al., 540 F. Supp. 1374, *rev'd* and *rem.*, 889 F.2d 803 (9th Cir. 1982) ("Fidelity I") and Fidelity Financial Corp. v. Fed. Home Loan Bank of San Francisco, ____ F. Supp. ____ (N.D. Cal. October 3, 1983) ("Fidelity II").

and implement its credit program." Fidelity II, at ; slip op. at 33. We reasoned that were we not to uphold this authority to "creat(e) . . . different lending terms to suit different creditworthiness of borrowers", we would "totally eviscerate § 9" and "read much of § 7(j) out of the statute. *Id.* at 32-33.

However, we ruled that Fidelity could seek to prove its allegations that the OSC option was adopted by the Bank and applied to Fidelity for the *purpose* of "harming" Fidelity. We noted in Fidelity II that Fidelity alleged that the OSC option was "newly instigated" (*Id.* at 3) with the "hope and purpose of saddling Fidelity with insurmountable obstacles to financial recovery" (*Id.* at 26-27), and with an intent "to accelerate (Fidelity's) crumbling fortunes" (*Id.* at 36); that the OSC option constituted a "novel, and spiteful abuse of (the Bank's) authority;" and, most importantly, that Fidelity was "the first, last and only association to be placed in this program." (*Id.* at 4).

In considering the Bank's earlier motion to dismiss, we were required to assume that these allegations of "dastardly deeds" were true[2] thus, we allowed Fidelity's fourth claim for breach of

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[2]We were somewhat disturbed by Fidelity's retreat in oral argument on this motion from a position we had understood it to have maintained throughout: that the Bank had contrived of the OSC program, placed Fidelity within its strictures and left Fidelity to languish for arbitrary and unreasonable purposes as a means to "punish" those officers and equity holders for financial decisions of which it did not approve.

However, we have reviewed the language of the Third Amended Complaint, in order to charge Fidelity with no more demanding a burden of proof than that which it voluntarily assumed by its allegations. These allegations included that (1) the Bank adopted and implemented the OSC "as a punitive classification to be imposed on an association whose practices, management or financial planning the Bank disapproves" constituting "patent discrimination against such an association" (Fidelity's Third Amended Complaint, ¶ 18); (2) "no other federal home loan bank ha(d) any credit program similar to the punitive OSC adopted by the defendant Bank" (Id.); and, (3) the factors upon which this "decision to place and retain Fidelity in the OSC . . . singled out Fidelity for punitive treatment" (Id., at ¶ 19-20), seeking monetary damages in the amount of $176.4 million, declaratory and injunctive

fiduciary duty to survive. Addressing the Bank's motion for summary judgment here, we consider for the first time the critical *factual* issue: did the Bank act in bad faith by "singling" Fidelity out for destruction by its credit decisions, and thereby violate some aforementioned "fiduciary duties"?

In Fidelity II, we found certain limited common law fiduciary duties implicit in the corporate structure of the Bank, to the extent not inconsistent with the Bank's full sweep of power and statutory responsibility, implicit from the language, history and legislative intent of the Bank Act. Private savings and loans within each district are given an opportunity to purchase stock in the regional bank within their district, by which they became its "member associations". Once members, these associations are shareholders in the banks, of which, Fidelity was one such member of the Bank here[3]. Some of Fidelity's rights as a member included dividend participation, having its deposits "federally insured" by FSLIC and being afforded an indirect voice in management of the Bank by selection of some members of the Banks' internal board of directors. It is important to note that Fidelity, or any other association, need not have been a member in order to borrow funds from the Bank.

Fidelity has contended throughout that a "principal" reason for becoming a "member association" was/is to secure a steady, reliable source of borrowed funds,[4] with which it contends the

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relief "permanently enjoin(ing) (the Bank) from including Fidelity in the OSC, from not extending to Fidelity regular advances as extended to other member institutions of the Bank, and from discriminating against Fidelity" (Id. at 15-16).

[3]Actually, the Bank of San Francisco is the successor-in-interest to two such merged former banks, the evolution of which is extensively discussed in Fahey, *infra*.

[4]Assuming that this was a principal motivation for Fidelity's decision to join the system, among a number of advantages it perceived flowed from its membership (including favorable consideration of loan requests). Fidelity has presented no evidence of such de facto partiality, or controverted the Bank's evidence that all S&Ls — membership status notwithstanding — are free to request borrowings.

Bank was obliged to provide it without "discrimination", at arguably the same rate and under the same conditions at which it chose to loan any other member[5] institution.

Fidelity's argument relies heavily upon a loose use of "discrimination"; a use which is far different from our use of the term "discrimination" in Fidelity II: a practiced distinction based upon malicious or arbitrary criteria. Fidelity uses "discrimination" to denote any distinctions drawn between parties, which is overbroad, and certainly not that to which our prior opinions acceded.

Fidelity attempts to cast the Bank's practice of establishing variable lending rates, depending upon the Borrower's creditworthiness, as a type of "discrimination" we suggested might violate the Bank's fiduciary duties in Fidelity II. But this characterization is obviously not within any reasonable interpretation of that opinion's discussion of the nature of the Bank's obligations to its member associations, or outside the scope of the virtually plenary lending authority we held was conferred upon the Bank by the Congress.

In fixing interest rates on its less-secure borrowings upon good-faith business judgments, the Bank alleges, and produces evidence, that it sought to reflect the risk-return realities of their loans. This was certainly within the inviolate scope of behavior of which our Fidelity I and II opinions took pains to uphold. Rather, the sole reservation in Fidelity II was a small, but meaningful, qualification to the Bank's otherwise "plenary discretion" under the Bank Act that we attributed to the common law duties of directors and officers to exercise care and loyalty in performance of their decision-making roles. Thus, it was our interpretation of the Bank Act, that Congress had intended that a member association, victimized by affirmative misfeasance or actionable negligence by the Bank's officers or directors, would have legal recourse for such acts that were taken in bad faith or in a grossly

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[5]This is not clear from Fidelity's papers; it is possible that Fidelity contends that the Bank may not legally make any loan rate or term distinctions to *any* borrower, regardless of its membership status, under the limited grant of power it draws under the Bank Act. In either case, this ambiguity is irrelevant to the matters before us today.

negligent manner. This qualification was necessary to, and harmonious with, the Act's otherwise rather exhaustive regulatory framework.

To establish itself within this limited cause of action, a member association need show that the aggrieved actions were prompted, not by an exercise of good-faith directorial discretion, but rather from some personal animus or malice toward the association's management or owners, or some grossly negligent, reckless or intentional violation of the officers' managerial responsibilities.

After over two years of discovery however, Fidelity presents no evidence that the Bank or any directors acted in bad faith, or in a grossly negligent manner, with respect to any credit decision affecting its OSC program in general, or to loans to Fidelity specifically. Instead, by sifting through the parties' respective Statements of Material Facts Not in Dispute, and taking due note of the respective objections thereto, several significant facts emerge unmistakably undisputed. As is eloquently stated in the Bank's final reply memorandum,

> (f)ar from being "newly instigated' or "novel", the credit program that included the OSC was created in 1975, four years before Fidelity was denied regular credit. Moreover, Fidelity received far more money from the Bank under its OSC option than it would have been able to routinely receive from most of the other Federal Home Loan Banks. Far from being the "first, last and only association to be placed in this (OSC) program," Fidelity was one of thirty-two such associations (13 before, 18 after). Far from being discriminated against, Fidelity received advances on exactly the same terms as all other associations which the Bank determined to be overcommitted, except to the extent that it received uniquely favorable treatment. And far from acting with an "intent to accelerate its crumbling fortunes," the Bank lent fidelity $1.4 billion which, given Fidelity's lack of creditworthiness, the Bank had no obligation to lend, and which allowed Fidelity to last as long as it did.

Defendant's Summary Judgment Reply Memorandum, at 2-3. Upon our independent review of the undisputed facts, we agree

with this characterization of the record. Fidelity cannot prove its allegations that the Bank officers schemed to capitalize upon an "unprecedented" period of wildly fluctuating interest rates, in the wake of deregulation of those rates, by somehow encouraging Fidelity's detrimental reliance upon securing funds from the Bank, to weather its "interest-rate gamble", only to ensnare Fidelity within the alluring, but ultimately, fatal web of the OSC.

DISCUSSION:

(1) Other Banks' And Board's Motions To Intervene For Leave To File Amicus Curiae Briefs In Support Of Bank's Position:

Both the other regional Banks and the Federal Home Loan Bank Board sought leave to file amicus briefs on both the Bank's motions to dismiss and for summary judgment. Since they are, as they claim to be, "part of a Federal banking system established by Congress for the purpose of ensuring the stability of financing" single family homes, we understand their interest in, and appreciate their views of, this litigation.

The requirements for our granting such parties leave to appear before the court as *amicus curiae* are left to our sound exercise of discretion. *Hoptowit v. Ray,* 882 F.2d 1237, 1260 (9th Cir. 1982). Here, participation by the other banks and the Board, by the submission of written briefs, already on file with the Court, is helpful in our achieving the systemic perspective of the controversy between the parties here.

Furthermore, since Fidelity did not object to these parties' respective motions for leave to appear as *amicus curiae,* said motions are granted.

The other bank's position is essentially that "in the absence of willful misconduct, federal common law bars any claim for damages arising out of the discretionary lending decisions" of the Bank's directors and officers. This is entirely consistent with our Fidelity II opinion; any *caveat* to an otherwise "plenary discretion" was but a small exception, designed as a curb upon precisely this sort of "willful misconduct".

The banks' and Board's support for this limitation upon our jurisdiction is summarized as finding nothing in the legislative history of the Bank Act to suggest that Congress intended to leave policing of the regional Bank's activities in the federal courts, since the Act does establish a Federal Home Loan Bank Board and the FSLIC — both suppose to curb the regional Banks' behavior. A second argument is more pragmatic: that the regional Banks are also borrowers, by reason of consolidated obligations sold in the market as a primary source of the home finance market, and imparting them with some common law duty to "bail out" over-extended associations by continuing credit, regardless of the association's creditworthiness, would diminish the system's ability to raise capital.

We acknowledge the panoply of express and implicit strictures upon the scope of our jursidiction over the federal home loan banking system. We are, however, reluctant to impart to congressional silence an intention to shield intentional or grossly negligent misfeasance by bank personnel who wield tremendous regulatory powers over members associations, leaving investors or management without any remedy for acts clearly outside the contemplation of Congress in devising the system.

Nonetheless, we agree with the *amicus curiae* position which urges that we limit the scope of our review to "wilful misfeasance".[6] In Fidelity II, we recognized the importance of allowing the Banks the flexibility of reacting to loan requests with good-faith decisions to extend or deny credit — and to charge varying rates for that credit — based upon the circumstances of the capital market, and their professional staff's assessment of the creditworthiness of the borrower. To the extent that the other banks and Board's argue that recognizing Fidelity's theory of fiduciary liability would diminish the system's ability to raise capital cheaply, because it would necessarily require that the Banks make higher risk loans, they are correct. However, recognizing the limited cause of action in Fidelity II: that congress

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[6]Our addition of a second aspect of this cause of action for gross negligence or recklessness is consistent with the first half for "wilful misfeasance".

preserved to member associations, by reason of their stock holdings in their respective home loan bank, redress for injury proved to have been caused by malicious animus or actionable violations of care by the bank's directors or officers, should not increase the cost of capital to these banks. On the contrary, the marketplace should consider those banks' consolidated obligations more secure, since there are limited legislative, administrative and judicial checks upon their lending authority, ensuring some anchor of reasonable business judgment in their underlying loan portfolio.

The Board's position is similarly consistent with our Order, and with our disposition here. The Board does not want our rulings to be seen as limiting the Banks' ability to lend money, subject to the imposition of conditions they deem appropriately tailored to the borrowers' creditworthiness. We agree with this proposition; we just require that this discretion be exercised in good faith, with the burden upon the party alleging bad faith or actionable error of judgment to prove the truth of his allegations.

(2) *Bank's Motion To Dismiss Fidelity's Claim As Improperly Pled As A Tort Action Against Bank, Rather Than As Claim Against The U.S. Under The FTCA:*

The Federal Tort Claims Act ("FTCA") provides a limited waiver of the United States' sovereign immunity for certain torts of federal employees. The FTCA makes the United States liable, if any party is to be held accountable, for certain injuries arising from "the negligent or wrongful act or omission of an employee of the government while acting within the scope of his office of employment". 28 U.S.C. 1346(b). The FTCA defines "employees of the government" to include officers of federal agencies, and defines "federal agency" to include corporations "primarily" acting as "instrumentalities of the United States". 28 U.S.C. § 2671. The question is whether the Bank is a "federal agency", and its directors and officers "employees" of the U.S., thus making the United States, not the Bank, the proper defendant of this suit.

Whether Fidelity's claim is subject to a jurisdictional defect, insofar as it is pled as a tort claim asserted against an "instrumentality" of the United States, but not brought under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 ("FTCA") is

a question of first impression. Clearly, claims such as those brought by Fidelity would be within the scope of the FTCA, if brought against the FSLIC or the Bank Board. See *Safeway Portland Employees' Fed. Credit Union v. FDIC*, 506 F.2d 1213, 1215 (9th Cir. 1974) (Sneed, J.) ("The FDIC clearly a federal agency and within the coverage of the FTCA").

However, two sub-issues are involved in the evaluation of the FTCA's applicability here: first, whether Fidelity's claim against the Bank arises out of contract, or whether it is one sounding in tort; and, second, whether the Bank is a federal agency" for purposes of the FTCA. Fidelity and the Bank agree, as regards the first, that Fidelity's claim is one arising in tort, not from some breach of an underlying contract obligating the Bank to perform various duties for Fidelity's benefit. Thus, this motion turns solely on whether the Bank is a "federal instrumentality" for purposes of the FTCA.

The Bank's argument is very straight-forward. It points out that the definition of an "agency" under the FTCA includes "corporations primarily acting as instrumentalities of the United States" (FTCA §§ 2671); that *Fahey v. O'Melveney & Myers*, 200 F.2d 420, 446 (9th Cir. 1952) says that the Bank is a "federal instrumentality" whose functions are "wholly governmental"; and thus, under the clear meaning of the FTCA, Fidelity's only avenue of recourse for any injuries suffered at the hands of the Bank is suit against the United States as the ultimately responsible party. Although indeed simple, this argument misdirects attention to relatively irrelevant issues, while obscuring the major themes which guide application of the FTCA.

In Fidelity II, we held the Bank to be a "federal agency" for the purpose of making the Bank accountable for its rulemaking and actions under the Administrative Procedures Act ("APA"), 5 U.S.C. § 551 *et seq.* Fidelity II, supra at 23. The Bank vigourously resisted being so classified; in its answer to Fidelity's Third Amended Complaint, as well as in its moving papers in support of its motion to dismiss, the Bank was very careful to deny that it was an "agency" for the APA, claiming instead to be a "government controlled corporation".

Here, there are two concerns: first, determining the correct classification under the *FTCA*, not the APA, and the applicable legal precedent; and second, reconciling our interpretation under the respective statutes. Happily, these are not Herculean tasks.

In support of its argument that it is an agency under the FTCA, the Bank relies primarily upon the sole case within the Ninth Circuit to deal with the federal home loan banking system, *Fahey v. Fed. Home Loan Bank of San Francisco*, 200 F.2d 420 (9th Cir. 1952). We reject the Bank's interpretation of *Fahey dicta* in support of it being held to be an agency for purposes of the FTCA; in *Fahey, supra*, the Ninth Circuit ruled that the Bank was a "federal instrumentality" with "wholly governmental" functions, in restricting the rights and remedies available to stockholders of the dissolved entity under the Bank Act.

In *Fahey, supra*, the Ninth Circuit[7] confronted a claim for damages and injunctive relief by former member associations and creditors of the Bank of Los Angeles, the immediate predecessor to the Bank of San Francisco, which, along with the Bank of Portland, were closed to permit their consolidation into a single new entity.

The gravamen of the complaint arose from the Federal Home Loan Bank *Board's* decision to close these regional banks located in Los Angeles and Portland, and open the Bank in San Francisco, and is best characterized as the former Bank of Los Angeles' claim to recover its assets which it alleged were "maliciously" transferred to the newly created Bank of San Francisco by the Board. The Circuit ruled in *Fahey*: (1) that the Bank of Los Angeles didn't have standing to challenge the Board's order closing it, and transferring its assets to the Bank of San Francisco; and, (2) that the former Bank's claims about the Board's abrogation of its due process rights and confiscatory rulemaking, al-

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[7]The opinion by Circuit Judge Bone is a cryptic and rambling 56 page treatment of admittedly a difficult situation: the elimination of a particular branch of the federal home loan bank system, by its consolidation into another entity. However, nothing in Fahey's broad dicta and vague scope is controlling precedent upon the issue presented here — namely, whether the Bank is a federal agency for purposes of the FTCA.

though nominally brought against other persons or entities, were, at bottom, claims against the United States. *Id.* at 453-55.

However, and this is the limitation of *Fahey's* authority, the former Bank's claim was assessed as outside the proper scope of the *Bank Act* — there was no mention in the decision of the scope of the FTCA, APA, or the Bank Act when the claims brought are properly pled against the Bank, as opposed to the Board. *Id.* at 455.[8] Obviously, since we're dealing with a member association's damage claim properly pled against its regional Bank, not the Board, complaining of an abuse of authority in rulemaking, *Fahey* sets a tone for our consideration of damage actions against components of the federal home loan system, but is not binding authority on the vulnerability of the Bank to the type of private damage action Fidelity brings here.

In defining what constitutes an "agency", the FTCA includes corporations "primarily" acting as "instrumentalities or agencies of the United States" within its ambit. But, if we examine instances in which particular institutions were held to be "agencies" within the ambit of the FTCA, these entities were: (1) those whose *ownership* of stock was held by the United States or source of *funding* was the Treasury; (2) those in which the *degree of supervision* by the federal government, or federal control in daily operations, was considerable; (3) those whose *employees* were considered federal employees or appointees; and/or, but most significantly, (4) those for whom any adverse judgment

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[8]Quite properly, the Circuit in Fahey held that the Bank of San Francisco was merely the product of a Board decision to consolidate certain branches, and thus a dilution of the interests of individuals in a former bank was not actionable against this successor-in-interest since the complaint was really with Board policy. *Id.* at 456-457. As for the underlying, and obvious, equity and creditor interests which the plaintiffs represented, (1) they should have known, *ex ante*, that they were at the mercy of the Board when they "invested" in a regulated industry; and, (2) the fact that the Board had plenary power to open, contract or completely shut a particular branch of a regional bank, as it chose to do in Los Angeles and Portland, wiped out any collateral attack on the decision as "wholly punitive" in motive. *Id.* at 456.

would, practically and predictably, be covered by *public funds* of the United States.

In *Lewis v. United States*, 680 F.2d 1239 (9th Cir. 1982), the plaintiff brought a suit under the FTCA for personal injuries that he had suffered when a truck driven by an employee of a Federal Reserve Bank ("FRB") (the banking industry analogue to the "Bank" here, part of the savings & loan industry). The FRB there prevailed, convincing both the district court and the Ninth Circuit that it was not a "federal agency".[9] The Circuit deemed "the critical factor" to be "the existence of federal *government control* over the 'detailed physical performance' and 'day to day operation' of that entity. (cites omitted)." *Lewis* at 1240. Other factors mentioned were: (1) "whether the entity is an *independent* corporation"; (2) "whether the government is involved in the entity's *finances*"; and, (3) "whether the mission of the entity furthers the policy of the United States". *Id.*

Under the rationale of *Lewis*, the Bank would appear similarly *not* to be an "agency" under the FTCA. First, although there are technical differences[10] between the FRBs and the FHLBs, these differences are irrelevant to a fundamental similarity between the two species of federal regional banks which justifies their placement within the same genus; Second, the nature of the claims by the plaintiff in *Lewis* is theoretically akin to that Fidelity presses here — both tort actions against employees of a quasi-public/quasi-private entity — unlike that in *Fahey*. Finally, analyzing the four characteristics stressed in *Lewis*, compels us to conclude that, in each instance, not only is the Bank theoretically identical to the FRB in *Lewis*, but also that, consistent with *Fahey*, in so ruling we do not interfere with the exercise of some broad based government power by reason of the tort claim — an interference

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[9]Although there are slight factual differences between that case involving a FRB, and this one involving a Federal Home Loan Bank, the Circuit's discussion of "whether an entity is a federal agency within the meaning of the (FTCA)" is illuminating.

[10]Differences in draftsmanship are easily attributed either to slight variances in congressional reaction to the pressure exerted by specific groups affected by the respective bills or to sloppiness.

which is the *sine qua non* for restricting certain types of tort claims within the confines of the FTCA.

Our holding here that the Bank is *not* a "federal agency" for purposes of the FTCA is perfectly consistent with our previous ruling in Fidelity II, ____ F. Supp. ____, ____(N.D. Cal. 1983), slip. op. at 23, that the Bank *is* a "federal agency" for purposes of the APA. As *Lewis* stated, a corporation performing important government functions can be regarded as a federal instrumentality for some purposes, but no others. *Id.* at 1242.

(3) *Bank's Motion For Summary Judgment On Fidelity's Fourth Claim For Breach Of Fiduciary Duties:*

The Bank offers three bases for our granting summary judgment on Fidelity's fourth, and final, claim for damages arising out of actions taken by the Bank's officers and directors which Fidelity has alleged were arbitrary and in bad faith. In Fidelity II, slip op. at 41, we concluded that Congress had intended that the officers and directors of the Bank adhere to "contemporary standards of conduct and mores of the marketplace" embodied in common law duties as directors of a corporation.[11]

The sole factual issue remaining for trial is whether the Bank, through its officers or directors, acted arbitrarily capriciously, or out of personal animus, by "singling" Fidelity out for punitive treatment either by instituting, placing into, or maintaining fidelity in, the OSC program, which had the effect of restricting fidelity's source of capital causing its collapse.

As discussed in the Introduction, *supra*, there is no credible evidence from which a rational trier of fact could conclude that the Bank acted in an arbitrary or malicious manner toward Fidelity. Instead of producing evidence to support or substantiate the narrow territory upon which we permitted it to pursue this claim, Fidelity has retreated once again to its initial argument: (1) that the Bank's credit program, which included the OSC, was

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[11]Exactly what those duties are, and exactly what the directors and officers did, were left unresolved by Fidelity II, since it was unnecssary for us to reach those matters in order to decide the motion then before us.

invalid *per se*; (2) that, although the Bank's analysts, through criteria not shown to be arbitrary, determined Fidelity to be overcommitted and ineligible to receive regular advances, the Bank somehow bore the affirmative duty to modify or waive previously promulgated and published lending terms, under either the Bank Act provision enabling the Banks to serve their members", or under some equitable notion of Fidelity's "special circumstances".

(a) *The Scope Of The Implied Fiduciary Duties*

We have previously ruled that Fidelity may recover damages form the Bank under federal common law for a breach by Bank officers or directors of their "fiduciary obligations, if any" in connection with their dealings with Fidelity. Fidelity II, slip op. at 7, n.3. But we did not define the scope of those obligations, either in the abstract or as applied to the case at bar. It made more sense to await development of the facts,[12] in order to avoid rendering a useless advisory opinion.

Fidelity has identified the following decisions by the Bank's officers and directors as the heart of its complaint: (1) adoption in 1975 of the five tiered credit program which included the OSC option ("adoption"); (2) the determination in November 1979, that Fidelity was overcommitted, and the Bank's refusal to extend it credit under regular terms, limiting it to OSC borrowings ("placement"); (3) the decision in 1980 not to continue Fidelity's special exemption from the 2% "extra" interest charge as part of the OSC, and not to lend Fidelity the $75 million which it claimed could pay off the outstanding OSC borrowings and lengthen its debt ("escape"); (4) the decision in April 1982 to cease advances to Fidelity ("termination").

At common law, the officers and directors of a lender like the Bank, which has characteristics of both a regulatory entity and a

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[12]Working only with Fidelity's allegations, it was difficult to strike a balance between sufficient specificity to guide the drafting of motions for summary judgment, with proper flexibility to permit Fidelity full and unfettered discovery into exactly what the motivation and intent of the Bank's personnel were.

commercial entity, have no fiduciary obligation to lend a stockholder funds on a "sweetheart" basis. On the contrary, a lender must deal with its officers and shareholders at an "arms' length basis", for fear that, without such a standard of fairness, shareholders could plunder the corporate treasury. Fidelity attempts to distinguish our situation here from the typical corporate setting, essentially claiming that the ability to borrow from the Bank is the principal purpose of its membership in the system. However, membership does not confer any special borrowing rights; nonmembers may also borrow from the Bank, and we have already ruled that the Bank Act "confer(s) plenary discretion upon the Bank to establish and implement its lending policies," (*id.* at 33), and that Fidelity had no "property right" to advances (*id.* at 34).

Federal Home Loan Banks are instrumentalities charged with serving a quasi-regulatory banking function to an entire region of the U.S., while avoiding much potential inefficiency and waste of being a quasi-regulatory entity. If anything is clear from both the language and legislative intent surrounding the Bank Act, it is that Congress intended for the banks to exercise, to the extent possible, a bevy of regulatory tasks, while maintaining themselves as profitable and self-funded enterprises. Rather than affording a member with some form of protected interest as such to receive advances under guaranteed subsidized market terms, the Bank has "plenary discretion" to make differing loan decisions based on its good faith assessment of the borrower's creditworthiness, including its prerogative to "establish more stringent terms for weaker, and riskier, loans" (*id.* at 33), with the macroeconomic and public policy concerns as its fundamental charge.

Fidelity now urges some inarticulated fiduciary responsibility on the Bank's part to have made favorable special accommodations to help Fidelity cope with the adverse effects of its overzealous lending fervor in the atmosphere of volatile interest rates following the Federal Reserve Board's deregulation. There is no such duty, nor any evidence that the Bank acted any less fairly, or with any animus, toward Fidelity [13] in implementing its credit

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[13]It is insufficient, and irrelevant, in determining whether the Bank officials acted improperly to merely show that Fidelity ultimately did not

policies than to any other member association within its system. It is clear that the sort of claims which Fidelity alleges are not cognizable within the scope of the Bank's duty to members like Fidelity under common law or the Bank Act.

Fidelity has not produced any evidence that the Bank fashioned its terms, or its interpretation of those terms, in either bad faith or actionable bad judgment. Indeed, to the extent that Fidelity urges that such decisions were outside the scope of the Bank's authority under the Bank Act, we reject such a position unequivocally. To the extent that Fidelity argues that the OSC policy was fashioned or applied as a tool for the Bank to rid themselves of Fidelity's then-existing management by forcing them into a financial crisis or later, by taking advantage of a self-induced crisis to exacerbate Fidelity's financial condition, they have produced no evidence of such intent, nor of facts which would establish the requisite causation. A better appraisal of the situation is found in Fidelity I: that Fidelity's management threw caution to the wind, by consistently gambling that interest rates would fall, and that such falling interest rates would permit it to refinance its "bullish" loan commitments, saving it from the crush of its highly leveraged portfolio. Unfortunately, fidelity lost its gamble — and the FSLIC receivership culminated in a sale of its remaining assets to CITICORP, wiping out these equity interests and displacing management.

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survive the OSC, and other savings and loans who may have participated to some extent in that OSC program did survive.

In order to maintain this claim, Fidelity must show discrimination, actionable negligence or intentional misconduct. This it has failed to do.

Without an adequate foundation linking the Bank's treatment of the two other associations to which Fidelity refers as the evidence of this animus, treatment or causation, with that consideration it received, those other instances where the Bank may or may not have chosen to act differently upon loan requests by other associations are of much evidentiary ambiguity, not to mention of uncertain probity.

(B) *Immunity For Discretionary Decisions:*

The Bank's assertion that its officers cannot be held liable to suit by Fidelity — an aggrieved would-be borrower who was denied credit — misses the mark on at least two grounds.[14]

First, the cases that the Bank cites as authority for placing its officers beyond Fidelity's reach all involved claims arising out of consumer loan denials by Federal Land Banks or Federal reserve Banks, rather than "wholesale-type" loan applications by member S&Ls. Although, as discussed above, the Bank did not have a duty to make better-than-market rate loans to Fidelity, it did have a responsibility to its members not to use its powers in a affirmatively discriminatory manner to accomplish some malicious purpose — such as Fidelity initially alleged in connection with the OSC program. To absolve the directors of any liability, or the Bank of *respondeat superior* liability for their actions, would negate this duty.

Second, Fidelity's complaint alleged more than just erroneous lending decisions by particular officers or directors: Fidelity alleged that the officers deliberately and intentionally abused their discretion in their dealings. No case law that the Bank cites supports extending immunity to bank officers for decisions made in bad faith, or in flagrant disregard of the standards established to guide their discretion.

(c) *The Business Judgment Rule:*

The Bank argues that summary judgment is appropriate because there is no evidence that any of the Bank's officers' or directors' decisions affecting Fidelity were the product of fraud, self-dealing or bad faith. We agree. Under the business judgment rule, corporate directors and officers are shielded from liability for mere errors of judgment, or for any damages incurred as a result of all their business decisions or "discretionary judgments" unless the plaintiff proves that those decisions or judgments were "predominately" influenced by bad motives. *Lewis v. Anderson*, 615

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[14]Although styled as a ground for our granting it summary judgment, the Bank's immunity argument is actually a motion to dismiss upon the pleadings.

F.2d 788, 781 (9th Cir. 1979). This was the chink in the Bank's armor that our previous order left open to Fidelity.

However, after two years of discovery, Fidelity has failed to produce a smoking gun: indeed, Fidelity has failed to provide this Court with one shred of evidence to support its allegations that the officers' and directors' decisions affecting Fidelity were influenced by personal hostility or any improper motive. Specifically, there is no evidence of any bad faith on the Bank's part in adopting the OSC in 1975; in conditioning any further advances to Fidelity upon the terms of the OSC; in refusing to continue the favorable treatment that the Bank had afforded Fidelity, in attempting to give it an opportunity to work itself out of its problems; and finally, to cease making advances, when credit analysts advised the Bank in April 1982 that Fidelity was hopelessly insolvent.

The Bank adopted a five-tiered credit system four years prior to the time Fidelity was adversely affected by the OSC. That credit program was fully described to the Board, which did not then, nor has ever, suggested that it violated the Bank Act or regulations. There is no allegation or evidence that the officers and directors who adopted the program in 1975 were hostile to Fidelity, or even had Fidelity in mind when passing it. Fidelity contends that the program was "entirely subjective and inappropriate". Not only have we already ruled that the Bank had "plenary discretion . . . to establish and implement (such) lending policies" (Fidelity II, slip op. at 33), but such allegations are conclusory, attacking the wisdom of the program, and completely lack factual support in the record showing bad faith.[15]

Whether the Bank's credit criteria should be as they are, so long as they are within the scope of the Act and its regulations, is a matter of business judgment beyond our scrutiny.

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[15]Whether or not some bank officials believed that any or all of the terms of the OSC might be a "lead sinker" to a troubled S&L forced to borrow under its terms is irrelevant to whether the ultimate decision upon the vote of the board of directors was in bad faith. Dissention or preliminary debate of the OSC is no indication of bad faith in its ultimate adoption, just as unanimity is no guarantee of good faith.

The Bank determined that Fidelity was overcommitted in November 1979, under the Bank's published guidelines of which Fidelity had ample notice. Additionally, the Bank warned Fidelity, in June 1979, that its continuing eligibility to receive advances was "dependent upon its maintaining a reasonable relationship between total fixed case commitments and anticipated sources of funds." Nevertheless, Fidelity continued to enter into staggering levels of new loan commitments totaling some $711 million dollars in the five months between June and October, 1979. When Fidelity then applied to the Bank in October, 1979 for a $75 million regular short-term loan, one of the Bank's credit analysts: Don Worthington determined, by means of a pre-arranged and uniformly-applied formula, that Fidelity was "overcommitted". There is no evidence whatever that this analyst, or any director or officer presented with the analyst's findings, harbored any malice towards Fidelity. Once this determination was made, the terms of the Bank's established credit program required that Fidelity be denied regular credit, and that any credit that was extended to Fidelity be limited to OSC terms.

There is absolutely no evidence to support Fidelity's allegation that it was "singled out" for limitation to OSC advances. To the contrary, before Fidelity was found to be overcommitted and thus limited to the OSC program, 13 other associations had similarly been found overcommitted, and limited to the OSC. All 13 were subject to existing OSC terms, just as Fidelity was, including an additional 2% interest rate charge. During the period when Fidelity received OSC advances (November 1979 to April 1982), 18 more associations were at one time or another within OSC, upon being found "overcommitted", and slapped with the same OSC conditions.[16]

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[16]Fidelity argues that Gibralter Savings & Loan in Beverly Hills, California should have also been found overcommitted and limited to the OSC to the same extent as was Fidelity. However, this is not relevant to the issue here: the Bank's treatment of Fidelity, as we discuss at some length in note — and, in any event, the discretionary decision of the Bank not to put a particular bank into the OSC at a particular instant, or not to slap it with the full range of sanctions attendant to OSC borrowing is fully within the scope of the business judgment rule.

There is no evidence that anyone deciding how much, or under what conditions, Fidelity should receive as advances acted out of malice or any other improper motive. That is the dispositive fact.

The Bank's decisions not to waive the OSC terms or let Fidelity "lengthen" short term debt into long term debt, and to cease waiving imposition of the 2% "punitive" interest charge in Fall 1980 have not been shown by Fidelity to have been discriminatory in any sense. On the contrary, the evidence appears to suggest that the Bank gave Fidelity a break on the interest component of the OSC for the period of May to October 1979, and only collected $3.4 million in extra interest charges from October 1979 until the Bank suspended those charges in March 1981 — while had Fidelity obtained those funds under the Bank's *short* (perhaps we should instead compare it to *long*) term credit program, it would have had to pay $5.5 million in commitment fees, which were waived under the OSC. Thus, the impact of the interest aspect of the OSC as applied to Fidelity does not appear discriminatory or particularly harmful.

Undoubtedly, Fidelity's main complaint seems to arise from the Bank's refusal to lengthen Fidelity's debt. The decision obviously is within the business judgment rule unless Fidelity shows some evidence of malice or bad faith, which of course it cannot do. The facts do show that the Bank did engage in negotiations with Fidelity about possibly lengthening some part of Fidelity's debt if Fidelity demonstrated some improvement in its financial conditions, as the Bank defined "improvement". This condition boiled down to Fidelity reducing its outstanding advances to levels in the manner the Bank felt appropriate: bringing its outstanding commitments in line with the ratios of borrowings to net worth, *etc.* for other associations similar in size and loan portfolio. Although Fidelity made repeated representations to the Bank to the effect that it intended to "mend" its ways by selling loans, Fidelity's borrowing during the Fall of 1981 remained high, and no significant attempts were made to pay down any of the nearly $700 million debt incurred to the Bank. Thus, it seemed to the Bank directors in October 1980, and it certainly does not seem arbitrary or ill-willed to us today, that the Bank should cease providing Fidelity with an exemption from the extra 2% interest

charge, by which it could speculate in the home loan market with relatively inexpensive money from the Bank, instead of having to reduce its exposure or face the CD market as did other S&Ls.

The Bank's decision to cease making advances to Fidelity on April 9, 1982 was amply supported by the good faith and not grossly negligent opinion of its analysts that Fidelity was hopelessly insolvent and was experiencing major savings withdrawals.[17]

Fidelity says little in opposition to this motion, except that the business judgment rule only applies in shareholder derivative suits. That is not the law however; the business judgment rule is an affirmative defense personal to the directors and officers of the corporation, and if the Bank's liability is merely *respondeat superior*, it may rely upon any defense that its directors or agents could have invoked. Secondly, although suits by disgruntled shareholders are more commonly brought as derivative actions, in order to avoid problems with standing and injury, there is no limitation of the business judgment rule to such derivative actions, and all judicial inquiry into the liability of corporate directors or officers for their discretionary decisions must begin with the business judgment rule. *See, e.g., Lewis, supra.*

(4) *Bank's Motion To Dismiss Fidelity's Third Claim Under The APA As Moot:*

The Bank has previously moved to dismiss the Third Claim For Relief of Fidelity's Third Amended Complaint, which is a claim asserted under the APA, on the grounds of mootness, no case or controversy and lack of a justiciable issue. The Bank's Notice of Motion to Strike and To Dismiss and supporting Memorandum of Points and Authorities were filed on November 9, 1983. At the hearing on the Bank's earlier motion the Court denied the motion with the remark that it was more suitably addressed in the context of a summary judgment motion.

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[17]We will not bother with chronicling Fidelity's terrible shape by April, 1982, save to say that there is no evidence that the Bank's decision to effectively "pull the plug" on Fidelity, by cutting off any further advances, was anything other than a prudent and merciful act.

In Fidelity's Statement of Undisputed Facts Not Included in the Bank's Statement of Undisputed Facts, at ¶ 34, Fidelity states that, "(o)n May 1, 1983, the Bank entirely eliminated OSC credit." The Bank does not dispute this fact, rendering this claim now appropriate for dismissal for lack of a justiciable controversy.

IT IS SO ORDERED.

DATED: Aug. , 1984

/s/ SPENCER WILLIAMS
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 82-1389 SW

Fidelity Financial Corporation,
Plaintiff,
v.
Federal Home Loan Bank of
San Francisco,
Defendant

ORDER DENYING PLAINTIFF'S MOTIONS FOR LEAVE TO FILE A FOURTH AMENDED COMPLAINT, AND FOR A NEW TRIAL, AND GRANTING EXPENSES TO DEFENDANT

Filed Oct. 24, 1984

On October 17, 1984, this matter came before the court on plaintiff's motions for leave to file a fourth amended complaint and for a new trial. Upon consideration of the papers submitted by the parties, and oral argument before the court, it is hereby ordered:

1. that plaintiff's motions for a new trial and for leave to file a fourth amended complaint are DENIED; and

2. that plaintiff is to pay to defendant the reasonable expenses incurred in opposing plaintiff's motion for a new trial, including attorney's fees.

IT IS SO ORDERED.

DATED: OCT. 24, 1984

/s/ SPENCER WILLIAMS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

No. C 82-1389 SW

Fidelity Financial Corporation,
Plaintiff,
vs.
Federal Home Loan Bank of
San Francisco,
Defendant

MEMORANDUM OPINION AND ORDER DENYING PLAINTIFF'S MOTIONS FOR LEAVE TO FILE A FOURTH AMENDED COMPLAINT, AND FOR A NEW TRIAL, AND GRANTING EXPENSES TO DEFENDANT

Filed Oct. 24, 1984

Plaintiff's motions for leave to file a fourth amended complaint and for a new trial came on for hearing before this Court on Wednesday, October 17, 1984. All parties were represented by counsel. After reviewing the motions and memoranda filed in support of and in opposition to the motions, and after hearing the arguments of counsel, this Court determined to deny the motions and entered an order to that effect on October 24, 1984. The Court also ordered plaintiff to pay to defendant the reasonable expenses incurred in opposing plaintiff's motion for a new trial, including attorneys' fees. The bases for the Court's order are set forth below.

1. *The Motion To Amend*

Plaintiff moved to file its fourth amended complaint on August 22, 1984, nearly two and one-half years after it commenced suit on April 9, 1982. In the interim, plaintiff had filed a first amended complaint on June 18, 1982, a second amended complaint on April 4, 1983, and a third amended complaint on October 27, 1983. The proposed fourth amended complaint sought to add two new claims for relief, a breach of contract claim (the Fifth Claim

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for Relief) and a tort claim for breach of an implied covenant of good faith and fair dealing (the Sixth Claim for Relief).

On October 3, 1983, this Court granted the defendant's motion to dismiss the First Claim for Relief (statutory violations) except that part of the First Claim seeking relief under the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.*) and the Second Claim for Relief (constitutional violations) of plaintiff's second amended complaint on the ground that such claims failed to state a claim for which relief could be granted.[1] The Court denied defendant's motion to dismiss plaintiff's Third Claim for Relief (breach of fiduciary duty)[2] and that part of the First Claim seeking relief under the A.P.A. Thereafter, on October 27, 1983, plaintiff filed its third amended complaint realleging its previous claims and making minor adjustments in the pleading of its Fourth Claim (formerly Third Claim) for Relief (breach of fiduciary duty).

On June 27, 1984, after completion of exhaustive discovery, this Court heard argument on the defendant's motions to dismiss the A.P.A. claim and for summary judgment with respect to plaintiff's Fourth Claim. This summary judgment motion was extensively briefed by both plaintiff and defendant. At the conclusion of oral argument, after fully considering all memoranda, supporting papers and argument of counsel, this Court orally stated its decision to grant summary judgment for defendant on plaintiff's Fourth Claim, and to grant the defendant's motion to dismiss the A.P.A. claim on the ground of mootness, and on August 30, 1984, formally entered an Order and Memorandum Opinion to that effect. The actions of this Court in dismissing the First and Second Claims for Relief on October 3, 1983, granting summary judgment with respect to the Fourth Claim for Relief on June 27, 1984, and dismissing the A.P.A. claim on June 27,

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[1]Plaintiff's original and first amended complaints also included a Fourth Claim for Relief (violation of the Sherman Act), but this claim was abandoned by plaintiff in its second amended complaint.

[2]Plaintiff's breach of fiduciary duty claim is the Third Claim for Relief in the second amended complaint and the Fourth Claim for Relief in the third amended complaint.

1984, effectively disposed of all elements of plaintiff's claims against the defendant.

Plaintiff's motion to amend its complaint yet a fourth time, filed ten months after this Court dismissed its First and Second Claims, two months after this Court granted summary judgment with respect to its Fourth Claim (and a motion to dismiss with respect to its A.P.A. claim), and after the completion of all discovery, is unduly tardy. Plaintiff has offered no explanation why its two new legal theories (breach of contract and implied covenant of good faith and fair dealing) could not as well have been advanced in its original complaint or in one of its previous three amended complaints. Both were well-recognized causes of action when plaintiff commenced this action in April 1982.

It is apparent to this Court that the theories of liability spelled out in plaintiff's original and three amended complaints represented counsel's considered judgment, over the course of two and one-half years, as to the best way for plaintiff to proceed on the alleged facts.[3] In this Court's judgment, plaintiff is offering its new legal theories at this late date, after its case has been completely disposed of, simply because it has not succeeded with any of the theories it has previously advanced. However, the law is well established in this and other circuits that, despite the liberality of Rule 15(a), Fed. R. Civ. P., trial courts are under no obligation to allow plaintiffs to advance theories in complaints filed seriatim and then, as each theory is rejected, give them further opportunity to amend their complaints to offer yet other theories. All litigation must come to an end.[4]

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[3]Counsel for plaintiff is a well-respected firm which is expert in the very matters at issue in the case at bar (Bank Act and related regulations).

[4]*See, e.g., Jordan* v. *County of Los Angeles*, 669 F.2d 1311, 1324 (9th Cir. 1982) ("Where the party seeking amendment knows or should know of the facts upon which the proposed amendment is based but fails to include them in the original complaint, the motion to amend may be denied."); *Mir* v. *Fosburg*, 646 F.2d 342, 347 (9th Cir. 1980) ("At some point, a party may not respond to an adverse ruling by claiming that another theory not previously advanced provides a possible grounds for

Moreover, plaintiff's proposed new claims are merely restatements of its earlier claims, already dismissed by this Court. The allegations of plaintiff's proposed Fifth and Sixth Claims are indistinguishable in substance from allegations contained in its First, Second and Fourth Claims for Relief. Although plaintiff asserts that its proposed claims are based on two "new" legal theories (breach of contract and breach of covenant of fair dealing), the Court has, in its earlier decisions, already considered and rejected the legal arguments on which these "new" theories of liability are based, and has similarly found that they are without any factual support in the record. Accordingly, the addition of these two proposed claims to plaintiff's complaint would not change the decision of this Court that plaintiff has failed to state any claims upon which relief can be granted and has failed to present any credible evidence, after full discovery, in support of its claims.

At oral argument, plaintiff's counsel suggested that there were "new facts" tending to support plaintiff's position.[5] These new

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relief and should be considered."); *Mende* v. *Dun & Bradstreet, Inc.*, 670 F.2d 129, 131 (9th Cir. 1982) ("The amended complaint is brought only to assert new theories, not because any new facts came to plaintiff's attention."); *Freeman* v. *Continental Gin Co.*, 381 F.2d 459, 469 (5th Cir. 1967) ("A busy district court need not allow itself to be imposed upon by the presentation of theories seriatim."); *Gregory* v. *Mitchell*, 634 F.2d 199, 203 (5th Cir. 1981) ("There was no abuse in the disallowance of an amendment to the pleadings offered after summary judgment had been granted."); *Glesenkamp* v. *Nationwide Mutual Insurance Co.*, 71 F.R.D. 1, 4 (N.D. Cal. 1974) ("The liberal amendment policy of the Federal Rules was not intended to allow a party to circumvent the effects of summary judgment by amending the complaint every time a termination of the action threatens.").

[5]Counsel explained that "that's why we are here and the only means we can do it is by having our complaint amended and by having this judgment set aside so we can have a new trial on these new theories and investigating these new facts." (Transcript of Proceedings, p. 4) Counsel's position in this regard is inconsistent with the position taken by plaintiff in its moving papers that the motion for leave to amend raised only new legal theories. (See Plf. Mem. of Pts. & Auths. in Support of Mot. to Am. Com., Pg. 3).

facts allegedly concern the manner in which instrumentalities of the federal government have dealt with other financial institutions in difficulty, particularly the efforts of the Federal Deposit Insurance Corporation ("FDIC") to assist the Continental Illinois Bank and the defendant's own efforts to assist American Savings & Loan. In particular, plaintiff's counsel contended that, if plaintiff were allowed to amend its complaint and have a new trial, it could show that the defendant engaged in discriminatory conduct toward the plaintiff when that conduct is compared with the FDIC's handling of the Continental Illinois Bank matter and the defendant's handling of the American Savings & Loan matter. It is clear to this Court, however, that development of these new factual allegations would not only require reopening the record but would require extensive, costly and time-consuming discovery into the details of the Continental Illinois Bank and American Savings & Loan matters and how they relate, if at all, to the case at bar. It is the opinion of this Court that the imposition of such a discovery burden on defendant at this late date would be highly prejudicial. This provides a further basis for denial of plaintiff's Rule 15(a) motion.[6]

2. *Motion for New Trial*

By motion dated September 7, 1984, plaintiff sought an order granting a new trial "for the consideration of the issues raised by plaintiff's Fourth Amended Complaint." This motion is specious. Plaintiff does not seek a retrial or rehearing with respect to any of the issues which this Court has already decided, but only a "new trial" on the new legal theories advanced in its proposed fourth amended complaint. Rule 59 motions are wholly inappropriate in this context. Their purpose is "to submit for *retrial* those issues that are deemed to have been resolved improperly." 6 Moore's Federal Practice § 59.03 (1983) (emphasis added). They are not intended to allow a party to present issues that could have been, but were not, raised previously. See *Milwee* v. *Peachtree Cypress*

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[6]If granting a motion for leave to amend will require the opposing party to conduct further substantial discovery, the motion may be denied on the ground of prejudice. *See, e.g., Jordan* v. *County of Los Angeles*, 669 F.2d 1311, 1324 (9th Cir. 1982).

Investment Co., 510 F. Supp. 284, 290 (E.D. Tenn. 1978); *Briggs & Stratton Corp.* v. *Baldrige*, 544 F. Supp. 667, 668 (E.D. Wisc. 1982).

Because plaintiff's new trial motion is specious on its face, it does not begin to meet the standard of Rule 11, Fed. R. Civ. P., that motions be "warranted by existing law or a good faith argument for the extension, modification or reversal of existing law." Under these circumstances, it is appropriate to order the plaintiff to pay to the defendant the reasonable expenses incurred in opposing plaintiff's motion for a new trial, including attorneys' fees. Plaintiff's counsel has submitted a declaration dated November 1, 1984, indicating that expenses in excess of $4,000 were so incurred. The Court considers $1,500 to be reasonable and hereby orders that such amount be promptly paid by the plaintiff to the defendant.

IT IS SO ORDERED.

Dated: 11-24-84

SPENCER WILLIAMS
UNITED STATES DISTRICT JUDGE

APPENDIX G

§ 1422.

As used in this Chapter —

(1) The term "board" means the Federal Home Loan Bank Board.

(2) The term "Federal Home Loan Bank" means a bank established by the board under authority of this chapter.

(3) The term "State" includes the District of Columbia, Guam, Puerto Rico, the Virgin Islands of the United States, and the Territories of Alaska and Hawaii.

(4) The term "member" (except when used in reference to a member of the board) means any institution which has subscribed for the stock of a Federal Home Loan Bank.

(5) The term "home mortgage loan" means a loan made by a member or a nonmember borrower upon the security of a home mortgage.

(6) The term "home mortgage" means a mortgage upon real estate, in fee simple, or on a leasehold (1) under a lease for not less than ninety-nine years which is renewable or (2) under a lease having a period of not less than fifty years to run from the date the mortgage was executed, upon which there is located a dwelling for not more than four families, and shall include, in addition to first mortgages, such classes of first liens as are commonly given to secure advances on real estate by institutions authorized under this chapter to become members, under the laws of the State in which the real estate is located, together with the credit instruments, if any, secured thereby.

(7) The term "unpaid principal," when used in respect of a loan secured by a home mortgage means the principal thereof less the sum of (1) payments made on such principal, and (2) in cases where shares or stock are pledged as security for the loan, the payments made on such shares or stock plus earnings or dividends apportioned or credited thereon.

(8) An "amortized" or "installment" home mortgage loan shall, for the purposes of this chapter, be a home mortgage loan to be repaid or liquidated in not less than eight years by means of regular weekly, monthly, or quarterly payments made directly in reduction of the debt or upon stock or shares pledged as collateral for the repayment of such loan.

(9) The term "nonmember borrower" includes an institution authorized to secure advances from a Federal Home Loan Bank under the provisions of subsection (e) of section 1426 of this title. July 22, 1932, c. 522, § 2, 47 Stat. 725; June 27, 1934, c. 847, § 507, 48 Stat. 1264; May 28, 1935, c. 150, § 1, 49 Stat. 293; 1947 Reorg. Plan No. 3, eff. July 27, 1947, 12 F.R. 4981, 61 Stat. 954; July 14, 1952, c. 723, § 10(c), 66 Stat. 604; Aug. 11, 1955, c. 783, Title I, § 109(a) (3), 69 Stat. 640.

§ 1423.

As soon as practicable the board shall divide the continental United States, Puerto Rico, the Virgin Islands, Guam, and the Territories of Alaska and Hawaii into not less than eight nor more than twelve districts. Such districts shall be apportioned with due regard to the convenience and customary course of business of the institutions eligible to and likely to subscribe for stock of a Federal Home Loan Bank to be formed under this chapter, but no such district shall contain a fractional part of any State. The districts thus created may be readjusted and new districts may from time to time be created by the board, not to exceed twelve in all. Such districts shall be known as Federal Home Loan Bank districts and may be designated by number. As soon as practicable the board shall establish, in each district, a Federal Home Loan Bank at such city as may be designated by the board. Its title shall include the name of the city at which it is established. July 22, 1932, c. 522, § 3, 47 Stat. 726; July 14, 1952, c. 723, § 10(c), 66 Stat. 604.

§ 1424.

(a) Any building and loan association, savings and loan association, cooperative bank, homestead association, insurance company, or savings bank shall be eligible to become a member of, or

a nonmember borrower of, a Federal Home Loan Bank if such institution (1) is duly organized under the laws of any State or of the United States; (2) is subject to inspection and regulation under the banking laws, or under similar laws, of the State or of the United States; and (3) makes such home mortgage loans as, in the judgment of the board, are long-term loans (and in the case of a savings bank if, in the judgment of the board, its time deposits, as defined in section 461 of this title, warrant its making such loans). No institution shall be eligible to become a member of, or a nonmember borrower of, a Federal Home Loan Bank if, in the judgment of the board, its financial condition is such that advances may not safely be made to such institution or the character of its management or its home-financing policy is inconsistent with sound and economical home financing, or with the purposes of this chapter.

(b) An institution eligible to become a member or a nonmember borrower under this section may become a member only of, or secure advances from, the Federal Home Loan Bank of the district in which is located the institution's principal place of business, or of the bank of a district adjoining such district, if demanded by convenience and then only with the approval of the board.

(c) Notwithstanding the provisions of clause (2) of subsection (a) of this section requiring inspection and regulation under law as a condition with respect to eligibility for membership, any building and loan association which would be eligible to become a member of a Federal Home Loan Bank except for the fact that it is not subject to inspection and regulation under the banking laws or similar laws of the State in which such association is organized shall, upon subjecting itself to such inspection and regulation as the board shall prescribe, be eligible to become a member. July 22, 1932, c. 522, § 4, 47 Stat. 726; June 13, 1933, c. 64, § 3, 48 Stat. 129.

§ 1425.

No institution shall be admitted to or retained in membership, or granted the privileges of nonmember borrowers, if the combined total of the amounts paid to it for interest, commission,

bonus, discount, premium, and other similar charges, less a proper deduction for all dividends, refunds, and cash credits of all kinds, creates an actual net cost to the home owner in excess of the maximum legal rate of interest or, in case there is a lawful contract rate of interest applicable to such transactions, in excess of such rate (regardless of any exemption from usury laws), or, in case there is no legal rate of interest or lawful contract rate of interest applicable to such transactions, in excess of 8 per centum per annum in the State where such property is located. This section applies only to home mortgage loans made after July 22, 1932. July 22, 1932, c. 522 § 5, 47 Stat. 727.

§ 1425a. Liquidity requirements for members

No member of a Federal Home Loan Bank shall make or purchase any loan at any time when its cash and obligations of the United States are not equal to such amount as the Federal Home Loan Bank Board shall by regulations prescribe: *Provided*, That such amount shall not be less than 4 per centum or more than 8 per centum of the obligation of the member on withdrawable accounts or, in the case of any member insurance company, such other base as the Board may determine to be comparable. The Board is authorized in said regulations to prescribe from time to time different amounts, within the limitations hereinbefore specified, for different classes of member institutions, and for such purposes the Board is authorized to classify such members according to type of institution, size, location, rate of withdrawals, or such other basis or bases of differentiation as the Board may deem to be reasonably necessary or appropriate for effectuating the purposes hereof. Failure to comply with the provisions hereof shall constitute ground for removal from membership. July 22, 1932, c. 522, § 5A, as added June 27, 1950, c. 369, § 1, 64 Stat. 256, and amended Aug. 11, 1955, c. 783, Title I, § 109(a)(3), 69 Stat. 640.

§ 1426.

(a) As soon as practicable after July 22, 1932, the board, with the approval of the Secretary of the Treasury, shall determine the minimum capital of each Federal Home Loan Bank which shall

be not less than $5,000,000. The board shall, as soon as practicable thereafter, open books in each district established under section 1423 of this title for subscription to the capital stock of the Federal Home Loan Bank of the district.

Par value of shares

(b) The capital stock of each Federal Home Loan Bank shall be divided into shares of a par value of $100 each. The minimum capital stock shall be issued at par. Stock issued thereafter shall be issued at such price not less than par as may be fixed by the board.

Minimum subscription; surrender and cancellation of oversubscription

(c) The original stock subscription for each institution eligible to become a member under section 1424 of this title shall be an amount equal to 1 per centum of the aggregate of the unpaid principal of the subscriber's home mortgage loans, but not less that $500. The board shall from time to time adjust the amount of stock held by each member so that, as nearly as possible, such member shall at all times have invested in the stock of the Federal Home Loan Bank at least an amount calculated in the manner provided in the preceding sentence (but not less than $500). If the board finds that the investment of any member in stock is greater than that required under this section, upon application of such member, the bank shall pay such member for each share of stock in excess of the amount so required an amount equal to the value of such stock, or, at the election of the bank, the whole or any part of the payments which would be so made shall be credited upon the indebtedness of the member to the bank. In either such event, stock equal in value to the amount of the payment or credit, or both, as the case may be, shall be surrendered and canceled. No share of stock shall be surrendered and canceled if the effect of such surrender and cancellation would be to violate the provisions of subsection (c) of section 1430 of this title requiring the amount of stock held by such

member to equal at least one-twelfth of the outstanding advances to such member.

Payments for stock

(d) Stock subscriptions other than by the United States shall be paid for in cash, and shall be paid for at the time of application therefor, or, at the election of the subscriber, in installments, but not less than one-fourth of the total amount payable shall be paid at the time of filing application, and a further sum of not less than one-fourth of such total shall have been paid at the end of each succeeding period of four months.

Loans to institutions not authorized to subscribe to stock

(e) If the law of the State under which an institution described in section 1424 of this title operates does not permit such institution to subscribe for stock in the Federal Home Loan Bank but if such institution has the power to borrow money and give security therefor, the board may permit such institution to obtain advances on the same terms and conditions and subject to the same limitations as members (except that such institution shall not be required, during the period during which advances may be made under this subsection, to subscribe for stock in the Federal Home Loan Bank or to deposit such stock as collateral security as required in section 1430 of this title), but such institution shall be required to keep on deposit such security, in addition to home mortgages, for such advances, as the board shall determine, which shall equal in value 1 per centum of the aggregate unpaid principal of such institution's home mortgage loans (but not less than $500). No advance to any such institution shall be made under authority of this subsection after the State in which the institution is organized enacts legislation authorizing such institution to subscribe for Federal Home Loan Bank stock or after the expiration of the next regular session of the legislature of such State begun after July 22, 1932, whichever is earlier. If, at the end of such time, such institution is not authorized to subscribe for stock, the bank shall proceed to liquidate the indebtedness of such institution to the bank and to terminate its relations with such

institution. No advance shall be made under authority of this subsection which matures more than one year after the advance is made, but the bank may renew any such advance for yearly periods, or less, thereafter. The maturity of no advance authorized under this subsection shall be later than the time of the enactment of legislation authorizing such institution to become a member or the expiration of such session of the legislature of the State, whichever is earlier.

Subscription by United States; maximum amount; payments

(f) The Secretary of the Treasury shall subscribe, on behalf of the United States, for such part of the minimum capital of each Federal Home Loan Bank as is not subscribed for by members under subsection (c) of this section within thirty days after books have been opened for stock subscriptions as provided in subsection (a) of this section. Payments for stock subscriptions by the Secretary of the Treasury shall be subject to call in whole or in part by the board, with the approval of the Secretary of the Treasury, at such time or times as may be deemed advisable. Each Federal Home Loan Bank receiving such payments shall issue receipts therefor to the Secretary of the Treasury, and such receipts shall be evidence of the stock ownership of the United States. The aggregate amount expended by the United States for the purchase of stock under this chapter shall not exceed $125,000,000.

Retirement of stock of United States

(g) After the amount of capital of a Federal Home Loan Bank paid in by members equals the amount paid in by the Secretary of the Treasury under subsection (f) of this section, such bank shall apply annually to the payment and retirement of the shares of the capital stock held by the United States, 50 per centum of all sums thereafter paid in as capital until all such capital stock held by the United States is retired at par. Stock held by the United States may at any time, in the discretion of the Federal Home Loan Bank and with the approval of the board, be paid off at par and retired in whole or in part; and the board may at any time require

such stock to be paid off at par and retired in whole or in part if in the opinion of the board of Federal Home Loan Bank has resources available therefor: *Provided,* That accumulated dividends, as provided in subsection (k), have been paid.

Transfer or hypothecation of stock

(h) Stock subscribed for otherwise than by the United States, and the right to the proceeds thereof, shall not be transferred or hypothecated except as hereinafter provided and the certificates therefor shall so state.

Withdrawal or removal of members; surrender and cancellation of stock

(i) Any member other than a Federal savings and loan association may withdraw from membership in a Federal Home Loan Bank six months after filing with the board written notice of intention so to do, and the board may, after hearing, remove any member from membership, or deprive any nonmember borrower of the privilege of obtaining further advances, if, in the opinion of the board, such member or nonmember borrower (i) has failed to comply with any provision of this chapter or regulation of the board made pursuant thereto; (ii) is insolvent: *Provided,* That any member of a bank which is a building and loan association, savings and loan association, cooperative bank, or homstead association shall be deemed insolvent if the assets of such member are less than its obligations to its creditors and others, including the holders of its withdrawable accounts: or (iii) has a management or home-financing policy of a character inconsistent with sound and economical home financing or with the purposes of this chapter. In any such case, the indebtedness of such member or nonmember borrower to the Federal Home Loan Bank shall be liquidated, and the capital stock in the Federal Home Loan Bank owned by such member shall be surrendered and canceled. Upon the liquidation of such indebtedness such member or nonmember borrower shall be entitled to the return of its collateral, and, upon surrender and cancellation of such capital stock, the member shall receive a sum equal to its cash paid

subscriptions for the capital stock surrendered, except that if at any time the board finds that the paid-in capital of a Federal Home Loan Bank is or is likely to be impaired as a result of losses in or depreciation of the assets held, the Federal Home Loan Bank shall on the order of the board withhold from the amount to be paid in retirement of the stock a pro rata share of the amount of such impairment as determined by the board.

Disposal of stock

(j) A Federal Home Loan Bank may, with the approval of the board, permit the disposal of stock to another member, or to an institution eligible to become a member, but only to enable such an institution to become a member.

Dividends

(k) All stock of any Federal Home Loan Bank shall share in dividend distributions without preference.

Acceleration of retirement of Government-owned stock

(l) Within one year after June 27, 1950, each member of each Federal Home Loan Bank shall acquire and hold and thereafter maintain its stock holding in an amount equal to at least 2 per centum of the aggregate of the unpaid principal of such member's home mortgage loans, home-purchase contracts, and similar obligations, but not less than $500. Such stock in excess of the amount hereby required may be purchased from time to time by members and may be retired from time to time as heretofore. One year after June 27, 1950, each Federal Home Loan Bank shall require and pay off at par an amount of its stock held by the Secretary of the Treasury equivalent to the amount of its stock held by its members in excess of the amount required to be held by them by the first two sentences of subsection (c) of this section immediately prior to June 27, 1950 and annually thereafter each Federal Home Loan bank shall retire an amount of such Government stock equivalent to 50 per centum of the net increase of its stock held by members since the last previous retirement: *provided*, That none of such Government capital shall at any time

be retired so as to reduce the aggregate capital stock, reserves, surplus, and undivided profits of the Federal Home Loan Banks to less than $200,000,000: *Provided further,* That notwithstanding any provision of this subsection, nothing in this subsection shall limit or affect the operation of subsection (g) of this section. July 22, 1932, c. 522, § 6, 47 Stat. 727; June 27, 1934, c. 847, § 509, 48 Stat. 1264; May 28, 1935, c. 150, § 2, 49 Stat. 293; June 27, 1950, c. 369, § 2, 64 Stat. 257; Aug. 11, 1955, c. 783, Title I, § 109(a)(1), 69 Stat. 640.

§ 1427.

(a) the management of each Federal Home Loan Bank shall be vested in a board of twelve directors, all of whom shall be citizens of the United States and bona fide residents of the district in which such bank is located: *Provided,* That the board may by regulation increase the number of elective directors of any Federal Home Loan Bank having a district which includes five or more States to a number not exceeding twice the number of States comprising such district, but such additional elective directors shall be apportioned as nearly as may be practicable in the same manner and order as is provided for the apportionment of elective directors under subsections (c) and (d) of this section: *Provided further,* That there shall be not less than one elective director from any of the States nor more than three elective directors from any of the States in any district referred to in the preceding proviso and in no event shall the total number of elective directors in any one district exceed eleven. The term "States" as used in the preceding provisos shall mean the States of the Union and the District of Columbia.

(b) Four of such directors shall be appointed by the Board and shall hold office for terms of four years; except that the terms of office of the two such directors appointed prior to May 28, 1935, shall expire at the end of the calendar years 1936 and 1937, respectively, and the terms of office of the first two such directors appointed after May 28, 1935, shall expire at the end of the calendar years 1938 and 1939, respectively.

(c) Six of such directors, two of whom shall be known as class A directors, two of whom shall be known as class B directors, and

two of whom shall be known as class C directors, shall be elected as provided in subsection (e) of this section, and shall hold office for terms of two years; except that the terms of office of the directors elected or appointed prior to May 28, 1935, shall expire at the end of the terms for which they were elected or appointed.

(d) Two of such directors shall be elected by the members of the Federal Home Loan Bank without regard to classes under rules and regulations to be prescribed by the Board, and shall hold office for terms of two years; except that the term of office of one of the directors first elected under this subsection shall expire at the end of the calendar year 1936.

(e) The board shall divide all the members of each Federal Home Loan Bank into three groups which shall be designated as groups A, B, and C, which groups shall represent, respectively, and as fairly as may be, group A, the large, group B, the medium-sized, and group C, the small members, the size of such members to be determined according to the aggregate unpaid principal of the member's home mortgage loans. The board may revise the membership of such groups from time to time. Of the directors elected as hereinafter provided, each class A director shall be an officer or director of a member in group A, each class B director shall be an officer or director of a member in group B, and each class C director shall be an officer or director of a member in group C. Each member shall be entitled to nominate suitably qualified persons for election as directors of the class corresponding to the group to which such member belongs, and shall cast one vote for each director in its class. The directors of each class shall be nominated and elected in accordance with such rules and regulations as may be prescribed by the board.

(f) Any director appointed or elected as provided in this section to fill a vacancy shall hold office only until the expiration of the term of his predecessor.

(g) The board shall designate one of the directors of each bank to be chairman, and one to be vice chairman, of the board of directors of such bank.

(h) If at any time when nominations are required, members shall hold less than $1,000,000 of the capital stock of the Federal

Home Loan Bank, the board shall appoint a director or directors to fill the place or places for which such nominations are required. A director so appointed shall serve until the expiration of the calendar year during which he takes office.

(i) Each bank may pay its directors reasonable compensation for the time required of them, and their necessary expenses, in the performance of their duties, in accordance with the resolutions adopted by such directors, subject to the approval of the board.

(j) Such board of directors shall administer the affairs of the bank fairly and impartially and without discrimination in favor of or against any member or nonmember borrower, and shall, subject to the provisions hereof, extend to each institution authorized to secure advances such advances as may be made safely and reasonably with due regard for the claims and demands of other institutions, and with due regard to the maintenance of adequate credit standing for the Federal Home Loan Bank and its obligations. July 22, 1932, c. 522, § 7, 47 Stat. 730; May 28, 1935, c. 150, § 3(a)(b), 49 Stat. 294; Aug. 11, 1955, c. 783, Title I, § 109(a)(2), 69 Stat. 640.

§ 1428.

The board shall cause to be made from time to time examinations of the laws of the various States of the United States and the regulations and procedure thereunder governing conditions under which institutions of the kinds which may become members or nonmember borrowers under this chapter are permitted to be formed or to do business, or relating to the conveying or recording of land titles, or to homestead and other rights, or to the enforcement of the rights of holders of mortgages on lands securing loans, or otherwise. If any such examination shall indicate, in the opinion of the board, that under the laws of any such State or the regulations or procedure thereunder there would be inadequate protection to a Federal Home Loan Bank in making or collecting advances under this chapter, the board may withhold or limit the operation of any Federal Home Loan Bank in such State until satisfactory conditions of law, regulation, or procedure shall be established. In any State where State examination of members or nonmember borrowers is deemed inadequate for the purposes

of the Federal Home Loan Banks, the board shall establish such examination, all or part of the cost of which may be considered as part of the cost of making advances in such State. The bank and/or the board may make studies of trends of home and other property values, methods of appraisals, and other subjects such as they may deem useful for the general guidance of their policies and operations and those of institutions authorized to secure advances. July 22, 1932, c. 522, § 8, 47 Stat. 731.

§ 1428a.

There is created a Federal Savings and Loan Advisory Council, which shall consist of one member for each Federal Home Loan Bank district to be elected annually by the board of directors of the Federal Home Loan Bank in such district and six members to be appointed annually by the Board. Each such elected member shall be a resident of the district for which he is elected. All members of the Council shall serve without compensation, but shall be entitled to reimbursement from the Board for traveling expenses incurred in attendance at meetings of such Council. The Council shall meet at Washington, District of Columbia, at least twice a year and oftener if requested by the Board. The Council may select its chairman, vice chairman, and secretary, and adopt methods of procedure, and shall have power —

(1) To confer with the Board on general business conditions, and on special conditions affecting the Federal Home Loan Banks and their members and the Federal Savings and Loan Insurance Corporation.

(2) To request information, and to make recommendations, with respect to matters within the jurisdiction of the Board and the Federal Savings and Loan Insurance Corporation. July 22, 1932, c. 522, § 8a, as added May 28, 1935, c. 150, § 4, 49 Stat. 294; 1947 Reorg. Plan No. 3, eff. July 27, 1947, 12 F.R. 4981, 61 Stat. 954.

§ 1429.

Any member or nonmember borrower of a Federal Home Loan Bank shall be entitled to apply in writing for advances. Such

application shall be in such form as shall be required by the Federal Home Loan Bank with the approval of the board. Such Federal Home Loan Bank may at its discretion deny any such application, or, subject to the approval of the board, may grant it on such conditions as the Federal Home Loan Bank may prescribe. July 22, 1932, c.522 § 9, 47 Stat. 731.

§ 1430.

(a) Each Federal Home Loan Bank is authorized to make advances to its members upon the security of home mortgages, or obligations of the United States, or obligations fully guaranteed by the United States, subject to such regulations, restrictions, and limitations as the Board may prescribe. Any such advance shall be subject to the following limitations as to amount:

(1) If secured by a mortgage insured under the provisions of subchapters I, II, VI, VIII, or X of chapter 13 of this title, the advance may be for an amount not in excess of 90 per centum of the unpaid principal of the mortgage loan.

(2) If secured by a home mortgage given in respect of an amortized home mortgage loan which was for an original term of six years or more, or in cases where shares of stock, which are pledged as security for such loan, mature in a period of six years or more, the advance may be for an amount not in excess of 65 per centum of the unpaid principal of the home mortgage loan; but in no case shall the amount of the advance exceed 60 per centum of the value of the real estate securing the home mortgage loan.

(3) If secured by a home mortgage given in respect of any other home mortgage loan, the advance shall not be for an amount in excess of 50 per centum of the unpaid principal of the home mortgage loan; but in no case shall the amount of such advance exceed 40 per centum of the value of the real estate securing the home mortgage loan.

(4) If secured by obligations of the United States, or obligations fully guaranteed by the United States, the advance shall not be for an amount in excess of the face value of such obligations.

Home mortgages as security

(b) No home mortgage shall be accepted as collateral security for an advance by a Federal Home Loan Bank if, at the time such advance is made (1) the home mortgage loan secured by it has more than twenty-five years to run to maturity, unless such home mortgage is insured under the National Housing Act, as amended, or insured or guaranteed under the Servicemen's Readjustment Act of 1944, as amended, or (2) the home mortgage exceeds $35,000, or (3) is past due more than six months when presented, unless the amount of the debt secured by such home mortgage is less than 50 per centum of the value of the real estate with respect to which the home mortgage was given, as such real estate was appraised when the home mortgage was made. For the purposes of this subsection and subsection (a) of this section the value of real estate shall be as of the time the advance is made and shall be established by such certification by the borrowings institution, or such other evidence, as the board may require. For the purposes of this section, each Federal Home Loan Bank shall have power to make, or to cause or require to be made, such appraisals and other investigations as it may deem necessary. No home mortgage otherwise eligible to be accepted as collateral security for an advance by a Federal Home Loan Bank shall be accepted if any director, officer, employee, attorney, or agent of the Federal Home Loan Bank or of the borrowing institution is personally liable thereon, unless the board has specifically approved by formal resolution such acceptance.

Notes of borrowing members; interest rate; limitation on loans; lien on stock

(c) Such advances shall be made upon the note or obligation of the member or nonmember borrower secured as provided in this section, bearing such rate of interest as the board may approve or determine, and the Federal Home Loan Bank shall have a lien upon and shall hold the stock of such member as further collateral security for all indebtedness of the member to the Federal Home Loan Bank. At no time shall the aggregate outstanding advances made by any Federal Home Loan Bank to any member exceed twelve times the amounts paid in by such

member for outstanding capital stock held by it, or made to a nonmember borrower exceed twelve times the value of the security required to be deposited under subsection (e) of section 1426 of this title.

Obligation to repay; additional security; sale of advances to other banks

(d) The institution applying for an advance shall enter into a primary and unconditional obligation to pay off all advances, together with interest and any unpaid costs and expenses in connection therewith according to the terms under which they were made, in such form as shall meet the requirements of the bank and the approval of the board. The bank shall reserve the right to require at any time, when deemed necessary for its protection, deposits of additional collateral security or substitutions of security by the borrowing institution, and each borrowing institution shall assign additional or substituted security when and as so required. Subject to the approval of the board, any Federal Home Loan Bank shall have power to sell to any other Federal Home Loan Bank, with or without recourse, any advance made under the provisions of this chapter, or to allow to such bank a participation therein, and any other Federal Home Loan Bank shall have power to purchase such advance or to accept a participation therein, together with an appropriate assignment of security therefor. July 22, 1932, c. 522, § 10, 47 Stat. 731; Apr. 27, 1934, c. 168, §10, 48 Stat. 646; June 27, 1934, c. 847, § 501, 48 Stat. 1261; May 28, 1935, c. 150, §§ 5, 6, 49 Stat. 294, 295; Mar. 28, 1941, c. 31, § 7, 55 Stat. 62; Aug. 1, 1947, c. 431, 61 Stat. 714; Apr. 20, 1950, c. 94, Title V, § 501, 64 Stat. 80; Sept. 1, 1951, c. 378, Title II, § 208, 65 Stat. 303; Aug. 2, 1954, c. 649, Title V, § 502, 68 Stat. 634.

§ 1430b.

Each Federal Home Loan Bank is authorized to make advances to nonmember mortgagees approved under sections 1707-1715, 1715b, and 1715c of this title. Such mortgagees must be chartered institutions having succession and subject to the inspection and supervision of some governmental agency, and whose

principal activity in the mortgage field must consist of lending their own funds. Such advances shall not be subject to the other provisions and restrictions of this chapter, but shall be made upon the security of insured mortgages, insured under sections 1707-1715, 1715b, and 1715c of this title. Advances made under the terms of this section shall be at such rates of interest and upon such terms and conditions as shall be determined by the Federal Home Loan Bank Board, but no advance may be for an amount in excess of 90 per centum of the unpaid principal of the mortgage loan given as security. July 22, 1932, c. 522, § 10b, as added May 25, 1935, c. 150, § 7, 49 Stat. 295; 1947 Reorg. Plan No. 3, eff. July 27, 1947, 12 F.R. 4981, 61 Stat. 954; Aug. 11, 1955, c. 783, Title I, § 109(a)(3), 69 Stat. 640.

§ 1431.

(a) Each Federal Home Loan Bank shall have power, subject to rules and regulations prescribed by the board, to borrow and give security therefor and to pay interest thereon, to issue debentures, bonds, or other obligations upon such terms and conditions as the board may approve, and to do all things necessary for carrying out the provisions of this chapter and all things incident thereto.

Issuance of consolidated Federal Home Loan Bank debentures; restrictions

(b) The board may issue consolidated Federal Home Loan Bank debentures which shall be the joint and several obligations of all Federal Home Loan Banks organized and existing under this chapter, in order to provide funds for any such bank or banks, and such debentures shall be issued upon such terms and conditions as the board may prescribe. No such debentures shall be issued at any time if any of the assets of any Federal Home Loan Bank are pledged to secure any debts or subject to any lien, and neither the board nor any Federal Home Loan Bank shall have power to pledge any of the assets of any Federal Home Loan Bank, or voluntarily to permit any lien to attach to the same while any of such debentures so issued are outstanding. The debentures issued under this section and outstanding shall at no time exceed

five times the total paid-in capital of all the Federal Home Loan Banks as of the time of the issue of such debentures. It shall be the duty of the board not to issue debentures under this section in excess of the notes or obligations of member institutions held and secured under section 1430(a) of this title by all the Federal Home Loan Banks.

Issuance of Federal Home Loan Bank bonds

(c) At any time that no debentures are outstanding under this chapter, or in order to refund all outstanding consolidated debentures issued under this section, the board may issue consolidated Federal Home Loan Bank bonds which shall be the joint and several obligations of all the Federal Home Loan Banks, and shall be secured and be issued upon such terms and conditions as the board may prescribe.

Additional or substituted collateral on adjustment of equities

(d) The board shall have full power to require any Federal Home Loan Bank to deposit additional collateral or to make substitutions of collateral or to adjust equities between the Federal Home Loan Banks.

Acceptance of deposits; restrictions on transaction of banking business

(e) Each Federal Home Loan Bank shall have power to accept deposits made by members of such bank or by any other Federal Home Loan Bank or other instrumentality of the United States, upon such terms and conditions as the board may prescribe, but no Federal Home Loan Bank shall transact any banking or other business not authorized by this chapter.

Rediscount of notes held by other banks; purchase of bonds of other banks

(f) The board is authorized and empowered to permit, or whenever in the judgment of at least four members of the board an emergency exists requiring such action, to require, Federal

Home Loan Banks, upon such terms and conditions as the board may prescribe, to rediscount the discounted notes of members held by other Federal Home Loan Banks, or to make loans to, or make deposits with, such other Federal Home Loan Banks, or to purchase any bonds or debentures issued under this section.

Reserves

(g) Each Federal Home Loan Bank shall at all times have at least an amount equal to the current deposits received from its members invested in (1) obligations of the United States, (2) deposits in banks or trust companies, (3) advances with a maturity of not to exceed one year which are made to members or nonmember borrowers, upon such terms and conditions as the Board may prescribe, and (4) advances with a maturity of not to exceed one year which are made to members or nonmember borrowers whose creditor liabilities (not including advances from the Federal home loan bank) do not exceed 5 per centum of their net assets, and which may be made without the security of home mortgages or other security, upon such terms and conditions as the Board may prescribe.

Investment of surplus funds

(h) Such part of the assets of each Federal Home Loan Bank (except reserves and amounts provided for in subsection (g)) of this section as are not required for advances to members or nonmember borrowers, may be invested, to such extent as the bank may deem desirable and subject to such regulations, restrictions, and limitations as may be prescribed by the board, in obligations of the United States, in obligations of the Federal National Mortgage Association, and in such securities as fiduciary and trust funds may be invested in under the laws of the State in which the Federal Home Loan Bank is located.

Treasury purchase of banks' obligations

(i) The Secretary of the Treasury is authorized in his discretion to purchase any obligations issued pursuant to this section, as heretofore, now, or hereafter in force and for such purpose the

Secretary of the Treasury is authorized to use as a public-debt transaction the proceeds of the sale of any securities hereafter issued under the Second Liberty Bond Act, as now or hereafter in force, and the purposes for which securities may be issued under the Second Liberty Bond Act, as now or hereafter in force, are extended to include such purchases. The Secretary of the Treasury may, at any time, sell, upon such terms and conditions and at such price or prices as he shall determine, any of the obligations acquired by him under this subsection. All redemptions, purchases, and sales by the Secretary of the Treasury of such obligations under this subsection shall be treated as public-debt transactions of the United States. The Secretary of the Treasury shall not at any time purchase any obligations under this subsection if such purchase would increase the aggregate principal amount of his then outstanding holdings of such obligations under this subsection to an amount greater than $1,000,000,000. Each purchase of obligations by the Secretary of the Treasury under this subsection shall be upon such terms and conditions as to yield a return at a rate determined by the Secretary of the Treasury, taking into consideration the current average rate on outstanding marketable obligations of the United States as of the last day of the month preceding the making of such purchase.

Audits

(j) Notwithstanding the provisions of the first sentence of section 857 of Title 31 audits by the General Accounting Office of the financial transactions of a Federal Home Loan Bank shall not be limited to periods during which Government capital has been invested therein. The provisions of the first sentence of subsection (d) of section 868 of Title 31 shall not apply to any Federal Home Loan Bank. July 22, 1932, c. 522, § 11, 47 Stat. 733; June 27, 1934, c. 847, § 503, 48 Stat. 1261; June 27, 1950, c. 369, §§ 3, 4, 64 Stat. 257; Aug. 2, 1954, c. 649, Title II, § 204(a), 68 Stat. 622.

§ 1432. Incorporation of banks; corporate powers

The directors of each Federal Home Loan Bank shall, in accordance with such rules and regulations as the board may

prescribe, make and file with the board at the earliest practicable date after the establishment of such bank, an organization certificate which shall contain such information as the board may require. Upon the making and filing of such organization certificate with the board, such bank shall become, as of the date of the execution of its organization certificate, a body corporate, and as such and in its name as designated by the board it shall have power to adopt, alter, and use a corporate seal; to make contracts; to purchase or lease and hold or dispose of such real estate as may be necessary or convenient for the transaction of its business, but no bank building shall be bought or erected to house any such bank, nor shall any such bank make any lease for such purpose which has a term of more than ten years; to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal; to select, employ, and fix the compensation of such officers, employees, attorneys, and agents as shall be necessary for the transaction of its business, subject to the approval of the board; to define their duties, require bonds of them and fix the penalties thereof, and to dismiss at pleasure such officers, employees, attorneys, and agents; and, by its board of directors, to prescribe, amend, and repeal bylaws, rules, and regulations governing the manner in which its affairs may be administered; and the powers granted to it by law may be exercised and enjoyed subject to the approval of the board. The president of a Federal Home Loan Bank may also be a member of the board of directors thereof, but no other officer, employee, attorney, or agent of such bank, who receives compensation, may be a member of the board of directors. Each such bank shall have all such incidental powers, not inconsistent with the provisions of this chapter, as are customary and usual in corporations generally. July 22, 1932, c. 522, § 12, 47 Stat. 735.

§ 1433. Exemption from taxation; obligation acceptable as credit on debt of home owner.

Any and all notes, debentures, bonds, and other such obligations issued by any bank, and consolidated Federal Home Loan Bank bonds and debentures, shall be exempt both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United

States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. The bank, including its franchise, its capital, reserves, and surplus, its advances, and its income, shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that in[1] any real property of the bank shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed. The notes, debentures, and bonds issued by any bank, with unearned coupons attached, shall be accepted at par by such bank in payment of or as a credit against the obligation of any homeowner debtor of such bank. July 22, 1932, c. 522, § 13, 47 Stat. 735; May 28, 1935, c. 150, § 8, 49 Stat. 295.

§ 1434. Depositaries of public money; financial agents

When designated for that purpose by the Secretary of the Treasury, each Federal Home Loan Bank shall be a depositary of public money, except receipts from customers, under such regulations as may be prescribed by said Secretary; and it may also be employed as a financial agent of the Government; and it shall perform all such reasonable duties as depositary of public money and financial agent of the Government as may be required of it. July 22, 1932, c. 522, § 14, 47 Stat. 736.

§ 1435. Obligations as lawful investments; liability of United States for debentures, etc., issued by banks

Obligations of the Federal Home Loan Banks issued with the approval of the board under this chapter shall be lawful investments, and may be accepted as security, for all fiduciary, trust, and public funds the investment or deposit of which shall be under the authority or control of the United States or any officer or officers thereof. The Federal reserve banks are authorized to act as depositaries, custodians, and/or fiscal agents for Federal Home Loan Banks in the general performance of their powers under this chapter. All obligations of Federal Home Loan Banks

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[1]So in original. Word "in" probably should be omitted.

shall plainly state that such obligations are not obligations of the United States and are not guaranteed by the United States. July 22, 1932, c. 522, § 15, 47 Stat. 736.

§ 1436. Reserves and dividends

Each Federal Home Loan Bank shall carry to a reserve account semiannually 20 per centum of its net earnings until said reserve account shall show a credit balance equal to 100 per centum of the paid-in capital of such bank. After said reserve has reached 100 per centum of the paid-in capital of said bank, 5 per centum of its net earnings shall be added thereto semiannually. Whenever said reserve shall have been impaired below 100 per centum of the paid-in capital it shall be restored before any dividends are paid. Each Federal Home Loan Bank shall establish such additional reserves and/or make such charge-offs on account of depreciation or impairment of its assets as the board shall require from time to time. No dividends shall be paid except out of net earnings remaining after all reserves and charge-offs required under this chapter have been provided for, and then only with the approval of the board. The reserves of each Federal Home Loan Bank shall be invested, subject to such regulations, restrictions, and limitations as may be prescribed by the board, in direct obligations of the United States, in obligations of the Federal National Mortgage Association, and in such securities as fiduciary and trust funds may be invested in under the laws of the State in which the Federal Home Loan Bank is located. July 22, 1932, c. 522, § 16, 47 Stat. 736; Aug. 2, 1954, c. 649, Title II, § 204(a), 68 Stat. 622.

§ 1437. Federal Home Loan Bank Board; creation; composition; powers and duties; salaries; independent agency; report to Congress

(a) For the purposes of this chapter there shall be a board, to be known as the "Federal Home Loan Bank Board", which shall consist of five citizens of the United States appointed by the President of the United States, by and with the advice and consent of the Senate. Not more than three members of the board shall be members of the same political party. Each member shall devote his entire time to the business of the board. Before

entering upon his duties each of the members shall take an oath faithfully to discharge the duties of his office. The President of the United States shall designate one of the members of the board to serve for a term of two years, one for three years, one for four years, one for five years, and one for six years from July 22, 1932, and thereafter the term of each member shall be six years from the date of the expiration of the term for which his predecessor was appointed. Whenever a vacancy shall occur among the members the person appointed to fill such vacancy shall hold office for the unexpired portion of the term of the member whose place he is selected to fill. Each of the members of the board shall receive a salary at the rate of $10,000 per annum: *Provided,* That during the fiscal year 1933 the salary shall be $9,000 per annum. The President shall designate one of the members as chairman of the board. The chairman shall be the chief executive officer of the board and in his absence or disability the duties of his office shall be performed by some one of the other members to be designated as acting chairman by the chairman in such order as he may determine. The board shall supervise the Federal Home Loan Banks created by this chapter, shall perform the other duties specifically prescribed by this chapter, and shall have power to adopt, amend, and require the observance of such rules, regulations, and orders as shall be necessary from time to time for carrying out the purposes of the provisions of this chapter. The board shall have power to suspend or remove any director, officer, employee, or agent of any Federal Home Loan Bank, the cause of such suspension or removal to be communicated in writing forthwith to such director, officer, employee, or agent, and to such Federal Home Loan Bank.

(b) The Home Loan Bank Board which was, pursuant to Reorganization Plan Numbered 3 of 1947, established and made a constituent agency of the Housing and Home Finance Agency shall, from August 11, 1955, cease to be such a constituent agency and shall be an independent agency (including the Federal Savings and Loan Insurance Corporation) in the executive branch of the Government: *Provided,* That the functions vested in the Chairman of said board under clause (2) of the last sentence of subsection (b) of section 2 of said reorganization plan are transferred to said board. Notwithstanding any other provision of

law, said board, the Chairman thereof except as herein otherwise provided, and the Federal Savings and Loan Insurance Corporation, respectively, shall have and may exercise all functions which they respectively had or could exercise, immediately prior to August 11, 1955 or immediately prior to June 24, 1954. Said board shall annually make a report of its operations (including those of the Federal Savings and Loan Insurance Corporation) to the Congress as soon as practicable after the first day of January in each year. The name of the Home Loan Bank Board is changed to "Federal Home Loan Bank Board". July 22, 1932, c. 522, § 17, 47 Stat. 736; 1947 Reorg.Plan No. 3, § 2, eff. July 27, 1947, 12 F.R. 4981, 61 Stat. 954; Aug. 11, 1955, c. 783, Title 1, § 109(a) (3), 69 Stat. 640.

§ 1438. Administrative expenses; assessment on banks

The board shall have power to levy semiannually upon the Federal Home Loan Banks, and they shall pay, on such equitable basis as the board shall determine, an assessment sufficient in its judgment to provide for the payment of its estimated expenses for the half year succeeding the levying of each such assessment, beginning with the second half of the calendar year 1933. All expenses of the board incurred in carrying out the provisions of this chapter, as determined by it, beginning July 1, 1933, shall be paid from the proceeds of such assessments, and if any deficiency shall occur in such fund at any time between such semiannual assessments the board shall have power to make an immediate assessment against the banks to cover such deficiency on the same basis as the original assessment. If any surplus shall remain from any assessment after the expiration of the semiannual period for which it was levied, such surplus may be deducted from the next following assessment. July 22, 1932, c. 522, § 18, 47 Stat. 737.

§ 1439. Officers and employees; appointment; compensation

The board shall have power to select, employ, and fix the compensation of such officers, employees, attorneys, and agents as shall be necessary for the performance of its duties under this chapter without regard to the provisions of other laws applicable

to the employment or compensation of officers, employees, attorneys, and agents of the United States. No such officer, employee, attorney, or agent shall be paid compensation at a rate in excess of the rate provided in the case of members of the board. The board shall be entitled to the free use of the United States mails for its official business in the same manner as the executive departments of the Government; and shall determine its necessary expenditures under this chapter and the manner in which they shall be incurred, allowed, and paid. The receipts of the Board derived from assessments upon the Federal Home Loan Banks and from other sources (except receipts from the sale of consolidated Federal Home Loan Bank bonds and debentures issued under section 1431 of this title) shall be deposited in the Treasury of the United States, and may be from time to time withdrawn therefrom to defray the expenses of the Board, and the salaries of its members and employees, whose employment, compensation, leave, and expenses shall be governed solely by the provisions of this chapter, specific amendments thereof, and rules and regulations of the Board not inconsistent therewith. All necessary expenses in connection with the making of supervisory or other examinations (except examinations of Federal Home Loan Banks), including the provision of services and facilities therefor, shall be considered as nonadministrative expenses. July 22, 1932, c. 522, § 19, 47 Stat. 737; May 28, 1935, c. 150, § 9, 49 Stat. 295; July 3, 1948, c. 825 § 2, 62 Stat. 1240.

§ 1439a. Deposits in special fund; availablity for all purposes of Federal Home Loan Bank and Federal Home Loan Bank Administration

All moneys and funds heretofore deposited in the Treasury of the United States under the last sentence of section 1439 of this title (including unexpended balances of moneys appropriated therefrom for administrative expenses), and hereafter all moneys and funds which would, except for this provision, be so depositable thereunder, shall be deposited with the Treasurer of the United States in a special deposit account and shall be available, retroactively as well as prospectively, for expenditure for all purposes of the Federal Home Loan Bank Board and the Federal Home Loan Bank Administration, subject to subsections (a) and

(b) of section 712a of Title 15. June 26, 1943, c. 145, Title I, § 101, 57 Stat. 186; 1947 Reorg. Plan No. 3, eff. July 27, 1947, 12 F.R. 4981, 61 Stat. 954; Aug. 11, 1955, c. 783, Title I, § 109(a)(3), 69 Stat. 640.

§ 1440. Examination of banks; powers of examiners

The board shall from time to time, at least annually, require examinations and reports of condition of all Federal Home Loan Banks in such form as the board shall prescribe and shall furnish periodically statements based upon the reports of the banks to the board. For the purposes of this chapter, examiners appointed by the board shall be subject to the same requirements, responsibilities, and penalties as are applicable to examiners under chapters 2 and 3 of this title, and shall have, in the exercise of functions under this chapter, the same powers and privileges as are vested in such examiners by law. July 22, 1932, c. 522 § 20, 47 Stat. 738; June 27, 1950, c. 369, § 10, 64 Stat. 259; Aug. 2, 1954, c. 649, Title VIII, § 802 (f), 68 Stat. 643.

§ 1441. Repealed. June 25 1948, c. 645, § 21, 62 Stat. 862, eff. Sept. 1, 1948

§ 1442. Reports, records, etc., of Treasury Department, Comptroller of the Currency, Board of Governors of Federal Reserve System; access to; consent to examination by applicants for advances

(a) In order to enable the board to carry out the provisions of this chapter, the Treasury Department, the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal reserve banks are authorized, under such conditions as they may prescribe, to make available to the board in confidence for its use and the use of any Federal Home Loan Bank such reports, records, or other information as may be available, relating to the condition of institutions with respect to which any such Federal Home Loan Bank has had or contemplates having transactions under this chapter or relating to persons whose obligations are offered to or held by any Federal Home Loan Bank, and to make through their examiners or other

employees, for the confidential use of the board or any Federal Home Loan Bank, examination of such institutions.

(b) Every institution which shall apply for advances under this chapter shall, as a condition precedent thereto, consent to such examination as the bank or the board may require for the purposes of this chapter and/or that reports of examinations by constituted authorities may be furnished by such authorities to the bank or the board upon request therefor. July 22, 1932 c. 522, § 22, 47 Stat. 739; Aug. 23, 1935, c. 614, § 203(a), 49 Stat. 704.

§ 1443. Forms of stock, debentures, etc.; preparation by Secretary of Treasury; expenses

In order that the Federal Home Loan Banks may be supplied with such forms of stock, debentures, and bonds as may be necessary under this chapter, the Secretary of the Treasury is authorized to prepare such forms thereof as shall be suitable and approved by the board, which shall be held in the Treasury subject to delivery, upon order of the board. The engraved plates, dies, and bed pieces executed in connection therewith shall remain in the custody of the Secretary of the Treasury. The board shall reimburse the Secretary of the Treasury for any expense incurred in the preparation, custody, and delivery of such stock, debentures, and bonds. July 22, 1932, c. 522, § 23, 47 Stat. 739.

§ 1444. Eligibility to membership in banks

(a) Any organization organized under the laws of any State and subject to inspection and regulation under the banking or similar laws of such State shall be eligible to become a member under this chapter if —

(1) it is organized solely for the purpose of supplying credit to its members;

(2) its membership (A) is confined exclusively to building and loan associations, savings and loan associations, cooperative banks, and homestead associations; or (B) is confined exclusively to savings banks; and

(3) of the institutions to which its membership is confined which are organized within the State, its membership includes a majority of such institutions.

(b) In all respects, but subject to such additional rules and regulations as the board may provide, any such organization shall be a member for the purposes of this chapter. July 22, 1932, c. 522, § 24, 47 Stat. 739.

§ 1445. Succession of Federal Home Loan Banks

Each Federal Home Loan Bank shall have succession until dissolved by the board under this chapter or by further Act of Congress. July 22, 1932, c. 522, § 25, 47 Stat. 740.

§ 1446. Liquidation or reorganization; acquisition of assets by other banks: assumption of liabilities

Whenever the board finds that the efficient and economical accomplishment of the purposes of this chapter will be aided by such action, and in accordance with such rules, regulations, and orders as the board may prescribe, any Federal Home Loan Bank may be liquidated or reorganized, and its stock paid off and retired in whole or in part in connection therewith after paying or making provision for the payment of its liabilities. In the case of any such liquidation or reorganization, any other Federal Home Loan Bank may, with the approval of the board, acquire assets of any such liquidated or reorganized bank and assume liabilities thereof, in whole or in part. July 22, 1932, c. 522, § 26, 47 Stat. 740.

§ 1447. Institutions authorized to subscribe for stock of banks

Any institution, except a national bank, trust company, or other banking organization organized under any law of the United States, including the laws relating to the District of Columbia, shall be authorized to subscribe for stock of a Federal Home Loan Bank if otherwise eligible to make such subscription under the terms of this chapter, any provision in any such law to the contrary notwithstanding. July 22, 1932, c. 522, § 27, 47 Stat. 740.

§ 1448. Effect of partial invalidity of chapter

If any provision of this chapter, or the application thereof to any person or circumstances, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances, shall not be affected thereby. July 22, 1932, c. 522, § 28, 47 Stat. 740.

§ 1449. Reservation of right to amend or repeal chapter

The right to alter, amend, or repeal this chapter is expressly reserved. July 22, 1932, c. 522, § 30, 47 Stat. 741.

§§ 1450 — 1460. Reserved for future legislation

INDEX TO

TITLE 12 — BANKS AND BANKING

For complete Index to this title, including material in this volume, see volume containing: Section 1461 to End

END OF VOLUME

SUBCHAPTER A — GENERAL

PART 500 — ORGANIZATION AND CHANNELLING OF FUNCTIONS

Subpart A — Functions and Responsibilities of the Board

§ 500.1 General statement and statutory authority.

The Federal Home Loan Bank Board (referred to in this subchapter as "Board") is responsible for the administration and enforcement of the Federal Home Loan Bank Act, the Home Owners' Loan Act of 1933, Title IV of the National Housing Act, and with respect to institutions subject to provisions of the foregoing acts and title, the Bank Protection Act of 1968, the Truth in Lending Act, and the Fair Credit Reporting Act. The members of the Board constitute the Board of Directors of the Federal Home Loan Mortgage Corporation, which was created by Title III of the Emergency Home Finance Act of 1970.

§ 500.2 The Federal Home Loan Bank System.

The Board supervises the Federal Home Loan Banks created by the Federal Home Loan Bank Act and issues regulations and orders for carrying out the purposes of the provisions of that Act. Savings and loan associations and other institutions specified in section 4 of the Federal Home Loan Bank Act that make long-term home mortgage loans are eligible to become members of a Federal Home Loan Bank. The functions of the Board with respect to the Banks and their members include, but are not limited to, the following: Prescribing the conditions upon which a Federal Home Loan Bank is authorized to make advances to its members and to nonmember borrowers; prescribing rules governing the payment and advertisement of interest or dividends on deposits, shares, or withdrawable accounts that may be paid by Bank members, other than those members the deposits of which are insured in accordance with the provisions of the Federal Deposit Insurance Act; prescribing rules and conditions upon which a Federal Home Loan Bank shall be authorized to borrow, to pay interest upon its borrowings, and to issue obligations; issuing upon such conditions as the Board may prescribe consolidated Federal Home Loan Bank bonds, notes, or debentures which are the joint and several obligations of all Federal Home Loan Banks; requiring examination of each Federal Home Loan Bank at least annually; appointing six directors to the board of directors of each Bank and conducting the election of the remaining directors by the members; approving dividends paid by each Federal Home Loan Bank; and acting on applications for Bank membership.

[41 FR 55853, Dec. 23, 1976]

§ 500.3 The Federal savings and loan system.

The Board is authorized under such rules and regulations as it may prescribe to provide for the organization, incorporation, examination, operation, and regulation of Federal savings and loan associations. Under this authority, the Board's functions include, but are not limited to, regulation of the corporate structure of such associations, regulation of the distribution of their earnings, regulation of their lending and other investment

powers, acting upon their applications for facility offices (including branch offices, limited facilities, mobile facilities and satellite offices), the regulation of mergers, conversions, and disolutions involving such associations, the appointment of conservators and receivers for such associations, and the enforcement of laws, regulations, or conditions against such associations or the officers or directors thereof by proceedings under section 5 of the Home Owners' Loan Act of 1933, as amended.

[40 FR 12989, Mar. 24, 1975]

§ 500.4 The Federal Savings and Loan Insurance Corporation.

The Federal Savings and Loan Insurance Corporation is under the direction of the Federal Home Loan Bank Board. The Corporation insures the accounts of all Federal savings and loan associations and of other building and loan, savings and loan, and homestead associations and cooperative banks that are eligible for insurance and the applications of which have been approved by the Corporation. The Corporation regulates and examines insured institutions within the authority conferred by Title IV of the National Housing Act and is authorized to enforce applicable laws, regulations, or conditions against insured institutions or the officers or directors thereof by proceedings under section 407 of the National Housing Act, as amended. The Corporation also regulates and supervises savings and loan holding companies pursuant to the provisions of section 408 of the National Housing Act, as amended.

PART 525 — ADVANCES

ADVANCES TO MEMBERS

§ 525.1 Limitations on advances.

A Bank shall not, unless the Board otherwise authorized, make advances to any member in excess of the limits set forth in § 563.8(b) of this chapter.

[46 FR 49106, Oct. 6, 1981]

§ 525.2 Extension of credit.

Each Bank board of directors shall adopt, and review at least semiannually, a policy on extension of credit to members consistent with this subchapter and stated Board policy. A Bank's officers designated by its board of directors may extend or deny credit and take other action consistent with such credit policy. Exception shall be made only with prior approval of the board of directors, or a committee it has designated to approve exceptions, and in accordance with this subchapter and Board policy. The board of directors shall require such officers to report promptly to it or the executive committee all actions taken under this section and shall review such actions for compliance therewith.

§ 525.3 Interest rates.

Rates of interest on advances to members shall, within the range established by the Board, be set by the board of directors of each Bank or, between regular meetings of the board, by a committee of directors selected by the board, or the Bank President if he is so authorized by the board. Unless the board otherwise specifies a Bank President may delegate any authority he possesses under this section to any officer or employee of the Bank.

§ 525.4 Bank stock collateral.

Under section 10(c) of the act, a Bank need not actually posses fully paid stock certificates before making an advance to a member, but such stock should be assigned in the note or other form of obligation used.

§ 525.5 Gold and gold-related securities ineligible as collateral.

No Bank may make an advance secured by, or accept as security for any obligation, gold or gold-related instruments or securities.

(Sec. 10, 47 Stat. 731, as amended (12 U.S.C. 1430); Reorg. Plan No. 3 of 1947; 3 CFR 1943-1948 Comp., p. 1071)

[43 FR 46842, Oct. 11, 1978. Redesignated at 49 FR 34198, Aug. 29, 1984]

§ 525.6 Terms of advances.

Banks may, under section 10 of the Act, make advances to members for periods of up to 20 years.

(Sec. 10, Stat. 731, as amended (12 U.S.C. 1430); Reorg. Plan No. 3 of 1947; 3 CFR 1943-1948 Comp., p. 1071)

[49 FR 34198, Aug. 29, 1984]

§ 525.7 Collateral securing advances.

(a) A Bank shall require each borrowing member to pledge collateral sufficient, in the judgment of the Bank, to secure advances obtained from the Bank under sections 10(a), or 11(g) of the Act. A Bank at any time may take action to perfect its interest in collateral.

(b) Eligible collateral shall consist of any property which is an authorized investment for the member institution and which falls within one of the following categories:

(1) Fully disbursed, whole first mortgages on improved residential property, not more than 90 days delinquent;

(2) Securities issued, insured or guaranteed by the United States Government or any agency thereof (including, without limitation, mortgage-backed securities issued or guaranteed by the Federal Home Loan Mortgage Corporation, the Federal National Mortgage Association and the Government National Mortgage Association);

(3) Deposits of a Bank; or

(4) Property which is acceptable to the Bank: *Provided*, that the Bank determines that such property has a readily ascertainable value and the Bank is able to perfect a security interest in such property.

(Sec. 10, 47 Stat. 731, as amended (12 U.S.C. 1430); Reorg. Plan No. 3 of 1947; 3 CFR 1943-1948 Comp., p. 1071)

[49 FR 34198, Aug. 29, 1984]

§ 525.8 Determination of value of collateral.

Each Bank shall determine the value of collateral. Methods used shall be consistently applied to all borrowers, and valuations shall be conclusive.

(Sec. 10, 47 Stat. 731, as amended (12 U.S.C. 1430); Reorg. Plan No. 3 of 1947; 3 CFR 1943-1948 Comp., p. 1071)

[49 FR 34198, Aug. 29, 1984]

§ 525.9 Additional collateral.

If eligible collateral for outstanding advances becomes deficient and the bank cannot correspondingly reduce the amount of advances, it may obtain any collateral to strengthen its position.

(Sec. 10, 47 Stat. 731, as amended (12 U.S.C. 1430); Reorg. Plan No. 3 of 1947; 3 CFR 1943-1948 Comp., p. 1071)

[43 FR 46842, Oct. 11, 1978. Redesignated at 49 FR 34198, Aug. 29, 1984]

§ 525.10 Short term advances.

In addition to advances permitted under section 11(g)(4) of the Act, unsecured advances, or advances on any kind of readily available security, may be made to members under section 11(g)(3) of the Act. Such advances must be approved by the Bank's executive committee, a majority of its directors, or two of its officers. Except with the prior approval of the Board, the aggregate unpaid principal of advances made under this section and any other advances having an unexpired maturity of more than 30 days, excluding advances pursuant to § 525.6 of this part, shall not exceed five percent of the member's withdrawable accounts.

(Sec. 10, 47 Stat. 731, as amended (12 U.S.C. 1430); Reorg. Plan No. 3 of 1947; 3 CFR 1943-1948 Comp., p. 1071)

[43 FR 46842, Oct. 11, 1978. Redesignated at 49 FR 34198, Aug. 29, 1984]

§ 525.33 Lines of credit.

A Bank's board of directors or executive committee may establish a line of credit for each prospective non-member mortgagee under section 10b of the Act.

§ 525.34 Eligible institutions.

The term "chartered institution having succession and subject to the inspection and supervision of some governmental agency" in section 10b of the Act means institutions subject by law to continual examination and supervision by some competent governmental agency. An institution may not qualify merely by contracting with the Federal National Mortgage Association, the Federal Housing Administration, or a similar agency to audit or examine it.

§ 525.35 Rates of interest.

Because non-member mortgagees have no capital investment in Bank stock, rates of interest on advances to them shall be at least one-half of 1 percent, but not more than 1 percent higher than rates charged to members, unless the Board authorizes otherwise.

§ 525.36 Application for advances.

Applications from non-member mortgagees shall be in writing on forms approved by the Director, Office of District Banks. A Bank may deny such an application or grant it on terms no more liberal than apply to advances to members.